No. 91-707

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In The

Supreme Court of the United States

October Term, 1991

JOHN B. LENNES, JR., COMMISSIONER OF THE DEPARTMENT OF LABOR AND INDUSTRY, STATE OF MINNESOTA,

and

MINNESOTA MECHANICAL CONTRACTORS ASSOCIATION, INC.,

Petitioners,

v.

BOISE CASCADE CORPORATION, A DELAWARE CORPORATION, BE&K CONSTRUCTION COMPANY, A DELAWARE CORPORATION, CHARLES L. LEE, RELCO UNISYSTEMS CORPORATION, A MINNESOTA CORPORATION, FORREST DAHMES, MID-STATES MECHANICAL SERVICES, INC., A MINNESOTA CORPORATION, AND KRISTINE SOUTHARD,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Every state in this country has enacted occupational licensing laws, which either prohibit or restrict employers from using employees to perform certain kinds of work unless those employees meet certain minimum qualifications. Minnesota has a regulation which restricts the use of unlicensed apprentices or trainees on high-pressure pipefitting projects, where improper installation can pose a substantial threat to public safety. The questions presented here are:

1. Does the Employee Retirement Income Security Act (ERISA) preempt state occupational licensing laws which limit the number of unlicensed employees an employer may use on a worksite because such laws "relate to" employers' apprenticeship or training programs?

2. Is a state law which regulates the permissible ratio between unlicensed and licensed employees on a worksite protected from ERISA preemption by ERISA's "savings clause," which says that ERISA shall not impair "any law of the United States," since federal apprenticeship rules require for federal approval that a state specify the proper ratio between unlicensed apprentices and licensed employees?

PARTIES

Petitioner John B. Lennes, Jr., Commissioner of Labor and Industry, State of Minnesota, succeeded Kenneth Peterson in office earlier this year. Former commissioner Peterson was a defendant-appellee in the proceedings before the Eighth Circuit Court of Appeals. The substitution is made pursuant to Rule 25(d)(1), Federal Rules of Civil Procedure, Rule 43(c), Federal Rules of Appellate Procedure, and Rule 35.3, Rules of the Supreme Court of the United States.

Petitioner Minnesota Mechanical Contractors Association, Inc. (MMCA), an intervenor at the district court level, was also a defendant-appellee in the circuit court proceedings. The MMCA is a private trade association composed of approximately 75 building contractors that employ between 5,000 and 7,000 men and women engaged in construction work in the State of Minnesota.

Plaintiffs-appellants were Boise Cascade Corporation, a Delaware corporation, BE&K Construction Company, a Delaware corporation, Charles L. Lee, Relco Unisystems Corporation, a Minnesota corporation, Forrest Dahmes, Mid-States Mechanical Services, Inc., a Minnesota corporation, and Kristine Southard.

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Petitioners John B. Lennes, Jr., Commissioner of Labor and Industry, State of Minnesota, and the Minnesota Mechanical Contractors Association, Inc. jointly

petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in *Boise Cascade Corp. et al. v. Peterson*, 939 F.2d 632 (8th Cir. No. 90-5238, July 29, 1991).

OPINIONS BELOW

The decision of the Eighth Circuit is published at 939 F.2d 632, and has been reprinted as Appendix A in the Appendix ("App.") to this certiorari petition. App. 1a-13a. The decision of the United States District Court for the District of Minnesota was published at 735 F. Supp. 1434 (D. Minn. 1990) and is reprinted as Appendix B. App. 14a-35a. The recommendations and report of the United States Magistrate were not published, but they are reprinted as Appendix C. App. 36a-74a.

JURISDICTION

The order and judgment of the Eighth Circuit was entered on July 29, 1991. The district court had jurisdiction over this matter under 28 U.S.C. § 1331, and the court of appeals had jurisdiction under 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Supremacy Clause, Article VI, clause 2 of the U.S. Constitution, sections 514 and 3(1) of the Employee Retirement Income Security Act, as amended, 29 U.S.C. §§ 1144 & 1002(1) (1988), the National Apprenticeship Act of 1937 (Fitzgerald Act), 29 U.S.C. § 50 (1988), regulations promulgated thereunder, 29 C.F.R. §§ 29.1 et seq. (1991), Minnesota's law requiring

the licensing of high-pressure pipefitters, Minn. Stat. § 326.48 (1990) and the relevant provisions of the Minnesota Department of Labor and Industry's rules restricting the use of unlicensed trainees on high-pressure pipefitting projects, Minn. Rules pts. 5230.0040-.0110 (1991). The relevant statutes and rules are reprinted in Appendix D. App. 75a-79a.

STATEMENT OF FACTS

Like virtually all state and many local governments, Minnesota has enacted a number of occupational licensing laws. Those laws either prohibit or restrict unlicensed individuals from performing certain kinds of work, and they are a central part of any state's regulatory system.

This case involves a Minnesota rule restricting the use of unlicensed workers on high-pressure pipefitting projects. Minnesota has regulated the installation of high-pressure piping[1] by statute and rule since 1937. The regulatory system developed because of the risk that an improperly installed high-pressure piping system could explode and cause catastrophic damage to human lives and property. J.A. 477.[2] Because of that potential danger and because state inspectors cannot supervise every job site, J.A. 478, part of Minnesota's regulatory scheme

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[1] High-pressure piping has historically been defined as piping used in the installation of hot water or steam heating boilers and any system of piping hot water or other medium used for heating that exceeds 30 p.s.i. gauge and 250 degrees fahrenheit. Minn. Stat. § 326.461, subd. 2 (1990). The statutory definition now also includes ammonia piping. *Id.*

[2] "J.A." refers to the joint appendix the parties submitted to the Eighth Circuit Court of Appeals.

governing high-pressure pipefitting has always been a general statutory prohibition against doing this kind of work without meeting minimum experience and educational qualifications and obtaining a journeyman or contracting pipefitters license. Minn. Stat. § 326.48, subd. 1 (1990).[3]

Before their amendment in 1989, however, the rules promulgated under this licensing statute contained a major loophole. The rules permitted "apprentices," defined as any person "engaged in learning and assisting in the installation of high-pressure steam piping under the supervision of a licensed steamfitter," to work on these projects so long as they registered with the state department of labor and industry. Minn. Rules pt. 5230.0110 (1989). The rules did not require "apprentices" to meet any substantive requirements, they in no way regulated the content of their training, nor did they place any constraint on the number of unlicensed apprentices that could work on a particular high-pressure pipefitting project.

Prior to the mid-1980's, the department found no need to limit the use of unlicensed apprentices on these projects because virtually all high-pressure pipefitting contractors who worked in Minnesota were covered by voluntary apprenticeship agreements or collective bargaining agreements that provided for minimum ratios between licensed journeymen and unlicensed apprentices on each job site. J.A. 63-88, 101-23, 478-79. Like 26 other

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[3] To obtain a journeyman license, for example, an applicant must be at least 20 years old, must have been a registered trainee or a journeyman pipefitter elsewhere for at least four years, must pass a written examination by at least 70 percent, and meet other educational requirements. *See* Minn. Rules pt. 5230.0080 (1991).

states, Minnesota has a voluntary apprenticeship program, Minn. Stat. ch. 178 (1990), under a U.S. Labor Department delegation of authority pursuant to the Fitzgerald Act, 29 U.S.C. § 50 (1988). Under the Fitzgerald Act, the Labor Department has developed apprenticeship standards that expressly include journeyman/apprentice ratio requirements and it has delegated the authority to establish similar standards to the states. 29 C.F.R. §§ 29.1-29.13 (1991). Minnesota's program does include such journeyman/apprentice ratio standards. Since 1973, it has recommended a jobsite ratio on pipefitting projects of one unlicensed apprentice for the first licensed journeyman and then one apprentice for each additional three licensed pipefitters. The program allows unions or employers to secure state "approval" of their apprenticeship plans, but unions and employers remain free in Minnesota to establish any apprenticeship or training programs they please and to administer them without state approval.

Beginning in 1985 or 1986, however, certain "merit shop" contractors began registering and using more and more unlicensed "apprentices" instead of licensed pipefitters on high-pressure pipefitting projects. J.A. 479. For example, at Boise Cascade's $595 million paper mill expansion project in International Falls, Minnesota, BE&K Construction, the general contractor, reported using twenty unlicensed trainees, but only ten licensed pipefitters. J.A. 43. Other contractors also started using large numbers of unlicensed personnel in their day-to-day operations. Relco acknowledged using twenty unlicensed "apprentices," but had only three licensed pipefitters on its payroll. J.A. 34. Likewise, Mid-States had nine unlicensed trainees, but only one licensed contractor pipefitter and one licensed journeyman pipefitter. J.A. 49.

Indeed, on approximately three occasions, state department of labor and industry inspectors went to merit shop job sites and discovered that *no* licensed pipefitters were present at all to supervise unlicensed "trainees." J.A. 479.

Because of its concern that a lack of adequate training or adequate supervision on these projects was exposing the public to increased accident risks, the state department of labor and industry proposed a new rule in 1989. Its goal was to preserve the integrity of Minnesota's high-pressure pipefitting licensing law without disrupting apprenticeship programs. Following the practice of voluntary apprenticeship agreements and collective bargaining agreements in the industry had always provided, the new rule required that the first unlicensed apprentice or trainee on a high-pressure pipefitting project be accompanied by at least one licensed pipefitter, and that, for every unlicensed apprentice or trainee after that, there be at least three licensed pipefitters on the project. In effect, the rule established a minimum job site ratio of licensed personnel to unlicensed trainees of 1:1, and thereafter 3:1.

Pursuant to Minnesota's Administrative Procedures Act (MAPA) Minn. Stat. § 14.14 (1990), the state office of administrative hearings, a neutral adjudicatory body, conducted a formal hearing on the proposed rule on September 21 and October 16, 1989. The plaintiffs in this case and their counsel vigorously participated in that hearing, presented testimony, and submitted lengthy legal memoranda to the administrative law judge.

Nevertheless, the administrative law judge found that the facts adequately justified adoption of the standard, and concluded that the proposed ratio requirement was "both needed and reasonable." J.A. 471-91. After the Chief Administrative Law Judge approved that decision on December 12, 1989, the new rules were published in

the Minnesota State Register on January 22, 1990, and were scheduled to go into effect on February 1, 1990.

On January 23, 1990, plaintiffs filed suit in the U.S. District Court for the District of Minnesota, alleging that the ratio requirement was preempted by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 et seq. (1988) and the National Labor Relations Act (NLRA), 29 U.S.C. §§ 157-58 (1988) and that it violated the minimum rationality requirements of substantive due process.[4] Their ERISA claim was that the ratio requirement interfered with their training programs, and therefore, "related to" employee benefit plans within the meaning of ERISA's preemption clause. On January 31, the district court granted the plaintiffs' motion for a temporary restraining order and, on the next day, referred the matter to U.S. Magistrate Franklin Noel for further proceedings.

The State appealed the injunction order to the U.S. Court of Appeals for the Eighth Circuit on February 15, 1990, and requested expedited consideration.[5] At the same time, the State requested the U.S. Magistrate to proceed as well, and moved for summary judgment on the merits. The Minnesota Mechanical Contractors Association, Inc. (MMCA) intervened, and also moved for summary judgment. On March 30, after the submission of briefs and an oral argument, Magistrate Noel issued his report recommending that the summary judgment motions be granted in their entirety. Plaintiffs filed exceptions, but on April 27, the court adopted the magistrate's

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[4] Plaintiffs later dropped their substantive due process claim in their first amended complaint, dated February 9, 1990.

[5] On March 30, the Eighth Circuit dismissed the appeal for lack of subject-matter jurisdiction.

report and recommendation and granted the State's motion for summary judgment.

The district court acknowledged that Minnesota's licensing law for high-pressure pipefitters might affect employers' apprenticeship and training programs, but it squarely rejected the argument that ERISA preempts every state law that might "affect" an employee benefit. Instead, the court reasoned that this Minnesota rule was not preempted by ERISA because it was a law of general applicability, it had only an incidental effect on ERISA's central concerns, and occupational licensing was a subject matter traditionally reserved to the states. App. 29a-31a. Moreover, the court concluded that to accept plaintiffs' argument would be tantamount to holding that ERISA preempts all state licensing statutes, since a flat prohibition on using unlicensed workers would obviously have an even greater impact on employer training programs than the ratio requirement at issue in this case. App. 30a. The court refused to attribute to Congress an intention to stretch ERISA preemption that far, and therefore held that ERISA did not preempt this regulation.[6]

On May 3, 1990, the plaintiffs appealed to the Eighth Circuit and sought both expedited consideration and an injunction against enforcement of the new rule pending the outcome. The court of appeals granted those motions on June 6, 1990, and then, on July 29, 1991, reversed the district court, holding that ERISA preempted the state's

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[6] Judge MacLaughlin also rejected plaintiffs' NLRA preemption argument. He concluded that Minnesota's ratio requirement was a minimum labor standard of general application and therefore not preempted by the NLRA. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985).

ratio requirement.[7] The panel "agreed with much of the district court's preemption analysis," App. 8a-9a, but it concluded that, since the plaintiffs' training programs were indisputably "employer benefit plans" and since Minnesota's rule would have some effect on those programs, ERISA's preemption provision applied. Unlike the district court, however, the court of appeals did not analyze the rationale behind ERISA's preemption provision nor did it consider the potential impact of a preemption holding on other state and local licensing laws or labor standards. Instead, the court simply held that the ratio rule was preempted because it directly and intentionally affected employee training plans. App. 10a-13a.

REASONS FOR GRANTING THE WRIT

Just last Term, this Court again admonished that, when considering possible federal preemption of state laws, the courts are to "start with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 2476, 2482 (1991), *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Indeed, in *Gregory v. Ashcroft*, 111 S.Ct. 2395 (1991), this Court adopted what it called a "plain statement" rule to determine whether Congress truly intended federal statutes to alter the usual constitutional balance between the states and the federal government.

The Eighth Circuit decision in this case flies in the face of these fundamental principles. At stake is a

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[7] The panel did not address the NLRA preemption issue.

Minnesota regulation requiring that, on high-pressure pipefitting projects, where mistakes or sloppy work can put the safety of the public at grave risk, most of those working must meet minimum experience and training requirements, pass an examination, and obtain a state license. By holding that ERISA preempts that regulation, solely because of the questionable effect it might have on employer apprenticeship or training programs, the court below has put all state and local occupational licensing requirements in jeopardy. Moreover, the Eighth Circuit decision extends the ERISA preemption doctrine well beyond the limits both this Court and the statute itself have already imposed.

By granting this petition, and then reversing the judgment of the court below, this Court can therefore accomplish several important objectives. First of all, it can restore the integrity of state occupational licensing laws and other state regulation, and thereby preserve for the states more of the regulatory tools they need to protect the health and safety of their citizens. Second, it can make explicit what has been implicit in many of its previous ERISA preemption decisions—that, ERISA does not preempt generally applicable state laws like this one that "function irrespective" of the existence of ERISA plans, even though they may impose some burdens on plan administrators and may affect the benefits plan participants receive. Finally, this Court can, for the first time, make it clear that, under ERISA's "savings clause," 29 U.S.C. § 1144(d), ERISA cannot preempt a state law which another federal statutory scheme actively promotes.

Each of these arguments will be addressed in turn.

I. THE CIRCUIT COURT DECISION THREATENS STATE OCCUPATIONAL LICENSING REQUIREMENTS AND OTHER STATE REGULATIONS THAT PROTECT THE HEALTH AND SAFETY OF THEIR CITIZENS.

This case raises serious questions about the continuing ability of the states to enact and enforce occupational licensing requirements and a whole host of other traditional state regulations designed to protect their citizens from harm. By so doing, the decision below raises substantial federalism questions which warrant review by this Court.

Occupational licensing requirements are a central part of any state's regulatory structure. Like most states, Minnesota uses licensing requirements to protect the safety and health of the public by insisting that the people doing certain kinds of work meet minimum experience and training standards. Whether it be the practice of law, medicine, or, as in this case, high-pressure pipefitting, one of the requirements that Minnesota imposes is that the practitioners be qualified and be capable of obtaining a license. As this Court has recognized:

> [T]he states have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.

Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975).

The Eighth Circuit's holding in this case threatens the viability of these traditional exercises of state regulatory authority. By concluding that ERISA preempts state laws that limit the freedom of employers to use as many unlicensed "apprentices" or "trainees" as they want on

any work project, because such laws "relate to" employee apprenticeship or training plans, the Eighth Circuit has, in effect, disabled most, if not all, occupational licensing regulations at the state and local level.[8]

This particular case involves high-pressure pipefitting, and Minnesota's considered determination that, if its citizens are to be protected from the risk of explosion or failure of these piping systems, it cannot permit unlimited numbers of unlicensed, unqualified "apprentices" or "trainees" to work on these projects. As the Administrative Law Judge who reviewed the rule at issue in this case found in his report:

> An improperly installed high-pressure piping system could have disastrous impact on the public. For example, steam, when under high pressure, has the potential explosive power equal to or greater than dynamite. A failure of high pressure steam system could have a catastrophic impact on human lives and property. . . . The Legislature has recognized that the failure to regulate pipefitting or the installation of high-pressure piping systems could cause harm or endanger the health, safety and welfare of citizens of this state, and that the potential for harm is recognizable and not remote.

J.A. 477. By taking away Minnesota's ability to effectively regulate the qualifications of those who practice this

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[8] The Minnesota regulation in question imposes what is often called a "ratio requirement," which the Eighth Circuit referred to as a "minimum jobsite ratio." Minnesota does not prevent unlicensed apprentices or trainees from working on high-pressure pipefitting projects; instead, it requires that, for the first unlicensed trainee on the project, there be at least one licensed journeyman, and then, for every trainee after that, at least three licensed journeymen.

trade, the circuit court's decision has put the safety of Minnesota's citizens in greater jeopardy.

The implications of the decision, however, go way beyond this particular trade or occupation. Minnesota, like all other states, relies heavily on licensing laws to protect the public in almost every field,[9] and the Eighth

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[9] Minn. Stat. ch. 326 (1990) contains licensing requirements for architects, engineers, surveyors, landscape architects, and interior designers, Minn. Stat. §§ 326.02-.15 (1990), for accountants, Minn. Stat. §§ 326.165-.231 (1990), for electricians, Minn. Stat. §§ 326.241-.248 (1990), for plumbers, Minn. Stat. §§ 326.37-.46 (1990), for water conditioning contractors and installers, Minn. Stat. §§ 326.57-.65 (1990), and for asbestos abatement workers, Minn. Stat. §§ 326.70-.82 (1990). Minnesota also licenses barbers, Minn. Stat. §§ 154.01-.26 (1990), boiler engineers, Minn. Stat. § 183.38 (1990), real estate brokers and closing agents, Minn. Stat. §§ 82.17-.34 (1990), chiropractors, Minn. Stat. §§ 148.01-.106 (1990), cosmetologists, estheticians, salon managers, and manicurists, Minn. Stat. §§ 155A.02, .07 (1990), dentists, Minn. Stat. §§ 150A.05-.09 (1990), embalmers and funeral directors, Minn. Stat. § 149.01 (1990), residential energy evaluators, Minn. Stat. § 216C.27 (1990), home care providers, Minn. Stat. § 144A.46 (1990), insurance adjusters, Minn. Stat. §§ 72B.01-.14 (1990), insurance agents, Minn. Stat. §§ 60A.17 (1990), insurance plan administrators, Minn. Stat. § 60A.23 (1990), marriage and family therapists, Minn. Stat. §§ 148B.29-.39 (1990), midwives, Minn. Stat. §§ 148.31-.32 (1990), nurses, Minn. Stat. §§ 148.171-.285 (1990), optometrists, Minn. Stat. § 148.57 (1990), osteopaths, Minn. Stat. § 147.01 (1990), peace officers, Minn. Stat. §§ 626.8462-.851 (1990), pesticide applicators, Minn. Stat. §§ 18B.29-.36 (1990), pharmacists, Minn. Stat. §§ 151.06,.10 (1990), physical therapists, Minn. Stat. §§ 148.65-.78 (1990), physicians and surgeons, Minn. Stat. § 147.01 (1990), psychologists, Minn. Stat. §§ 148.88-.97 (1990), social workers, Minn. Stat. §§ 148B.01-.28 (1990), veterinarians, Minn. Stat. § 156.01 (1990), and well constructors, Minn. Stat. §§ 103I.111, .205, .501, .525 (1990). Minnesota licenses attorneys, too. Minn. Stat. § 480.01 (1990).

Circuit decision puts the validity of all those regulations in doubt. Although Minnesota's pipefitter rule only *limits* the use of unlicensed employees, while most licensing laws impose an outright ban on unlicensed practitioners, the Eighth Circuit's holding that this rule "relates to" ERISA plans and it therefore preempted casts a very long shadow. If ERISA prevents a state from merely regulating the number of unlicensed workers, then it may well preempt an outright ban on unlicensed workers, where the impact on apprenticeship and training programs would be much greater.

There is no reason why the circuit court's rationale would not apply to occupations other than pipefitting. For example, under the circuit court's logic, if a hospital set up an "apprenticeship or training program" and directed unlicensed trainees or interns to do registered nurse (RN) or even physician work, ERISA would prevent a state from proscribing this practice because any such intervention would "relate to" the hospital's apprenticeship program. Or if a law firm decided to set up an "apprenticeship or training program" and sent out unlicensed trainees to advise clients or to appear in court, a state would again be precluded from acting, because any legislative or regulatory attempt to limit the use of unlicensed trainees to practice law would be preempted by ERISA.[10] Obviously, such extraordinary results would

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[10] By the same analysis, the experience and written examination requirements Minnesota imposes on pipefitter and other occupational license applicants would also have to be held preempted. Through those requirements, the state doubtless affects not only the length but also the content of most training programs. The Eighth Circuit's reasoning would sacrifice those requirements on the altar of ERISA preemption as well.

go well beyond Congress' intent, but they are countenanced, if not foreshadowed by the ruling below.

Indeed, if states cannot regulate the use of apprentices or trainees because any such registration would "relate to" apprenticeship or training programs, then, by the same reasoning, the states cannot impose minimum wage-and-hour on occupational safety and health standards on employees to protect "apprentices" or "trainees" either. Obviously, those regulations affect apprenticeship and training programs in some way, sometimes substantially. The Congress that enacted ERISA, however, cannot have intended to sweep away all state laws that protect employees, merely because an employer chooses to designate those employees as "apprentices" or "trainees."

The consequences of the Eighth Circuit's holding are even more far-reaching, however. If ERISA preempts all state regulation that affects apprenticeship or training programs, then it must preempt all state regulations that affect medicine, surgery, hospital care, day care centers, legal services, scholarships, vacation, unemployment or severance pay, or any other potential ERISA welfare plan benefit. The fact that Congress gave employers the option of providing certain employee benefits through ERISA plans cannot mean that Congress intended to eliminate the power of the states to enact regulations that might affect those benefits or plans. Yet, that is the clear implication of the Eighth Circuit's decision.

The ruling below does not consider the potential consequences of the holding. To allow its reasoning to stand is therefore to leave a regulatory "black hole" of mammoth proportions. It would preclude state and local governments from exercising a multitude of traditional

occupational licensing and other police power regulations. Moreover, by striking down an otherwise valid state regulation on its face on federal preemption grounds,[11] in an area where states have traditionally exercised considerable authority, the Eighth Circuit has raised important questions of federal/state relations. As this Court has cautioned in previous ERISA preemption decisions, "[a]bsent any indication that Congress intended such far-reaching consequences, we are reluctant to so significantly interfere with 'the separate spheres of governmental authority preserved in our federalist system.' " *Massachusetts v. Morash*, 109 S.Ct. 1668, 1675 (1989); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19 (1987). The court below had no such hesitation, however, and therefore this case merits consideration by this Court.

II. THE EIGHTH CIRCUIT DECISION TO EXTEND ERISA PREEMPTION TO STATE OCCUPATIONAL LICENSING LAWS, WHICH APPLY WHETHER EMPLOYERS HAVE ERISA PLANS OR NOT, IS CONTRARY TO THE PREVIOUS DECISIONS OF THIS COURT AND WHOLLY UNWARRANTED.

Few areas of the law of federal preemption have bred as much confusion and difficulty as ERISA. In the last decade, this Court has considered the issue at least ten times, and the lower federal courts and the state courts together have issued dozens of ERISA preemption decisions. Now, sixteen years after the statute was enacted, the scope of ERISA's preemption clause remains a subject of protracted litigation and controversy.

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[11] Prior to 1988, of course, this case would have come within the Court's mandatory appeal jurisdiction.

The reason stems, in part, from the language of the statute itself, which this Court has acknowledged is "not a model of legislative drafting." *FMC Corp. v. Holliday*, 111 S.Ct. 403, 407 (1990), *quoting Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985). Although ERISA expressly preempts every state law that "relates to" employee benefit plans, no one seriously suggests that Congress intended ERISA to preempt every state law that "affects" employee benefit plans, since such a construction could be lethal to virtually any state regulation. Therefore, for some time now, both this Court and the lower courts have relied on this Court's now oft-repeated pronouncement that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 483 (1990); *FMC Corp. v. Holliday*, 111 S.Ct. 403, 407 (1990), *quoting Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983).

The unprecedented holding of the Eighth Circuit in this case, however, striking down on its face an otherwise unremarkable state licensing law because it had "a connection with or reference to" employer training programs, demonstrates that this formulation of ERISA preemption doctrine simply does not provide the lower courts with sufficient guidance. The broad language in the statute and in some of this Court's opinions has apparently blinded some lower courts to the fact that this Court indeed recognizes limits to ERISA preemption. The court below failed to appreciate those limits, and this case therefore presents an excellent opportunity for this Court to clarify the reach of ERISA preemption and give both the states and the courts the additional guidance they so clearly need.

One possible method is implicit in this Court's previous ERISA preemption decisions, an approach on which the district court largely relied. Unlike the circuit court, the district court recognized the distinction between state laws which are premised on the existence of ERISA plans and therefore preempted,[12] and state laws which might affect ERISA plans but which apply whether or not an ERISA plan is in place, which are not preempted. This Court first began to articulate that distinction in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), in rejecting an ERISA preemption challenge to a Maine statute requiring employers to offer severance pay to employees affected by plant closings, even though severance was a typical ERISA plan benefit. The Court held that ERISA does not preempt state laws that relate to employee benefits, only state laws that relate to employee benefit *plans*. Finding that "Congress intended preemption to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations," *id.* at 11, the Court determined that:

> This concern only arises, however, with respect to benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligation. It is for this reason the Congress preempted state laws relating to *plans*, rather than simply to *benefits*.

Id. (emphasis in original). Therefore, since the Maine statute did not require any employer to either set up or maintain an "ongoing plan," it did not implicate ERISA's regulatory concerns and was not preempted. *Id.* at 12; *see also Massachusetts v. Morash*, 109 S.Ct. 1668 (1989) (state

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[12] This category includes state laws which require employers to establish ERISA plans in the first place.

criminal prosecution for nonpayment of wages for unused vacation time not preempted, even though vacation can be an ERISA benefit). Not only did the state law not require the establishment of a "plan," but indeed it could apply regardless of whether an employer ever established an ERISA plan.

The Court solidified that distinction between impermissible state laws that apply only when ERISA plans exist, and permissible state laws, which might affect those plans but also apply generally, in *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988). In *Mackey*, the Court held that ERISA did not preempt a state garnishment statute, even though, as the Court acknowledged, application of the state law to ERISA plans would affect the benefits plan participants would receive and would impose a substantial burden on plan administrators. *Id.* at 841. At the same time, the Court also held in *Mackey* that even a state law designed to *relieve* ERISA plans from administrative burdens and to *protect* ERISA plan participants from the reach of general state law will be preempted, if it makes express reference to ERISA plans. Consequently, the Court in *Mackey* struck down a state law provision *exempting* ERISA plans from garnishment. *Mackey* therefore stands for the principle that it is not the degree to which a state law *affects* an ERISA plan that is dispositive. Rather, what is determinative is whether the state law applies only when employers have established ERISA plans. If the state law instead applies generally, then it does not have a "connection with or reference to" ERISA plans and is not preempted.

Last Term, this distinction emerged even more clearly. In *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478

(1990), the Court struck down a Texas law cause of action for employees who contend they were discharged because their employer does not want to pay either contributions to or benefits from a pension plan. On its way to that conclusion, however, the Court took pains to outline, albeit in dicta, what it saw as the current limits of ERISA preemption. The Court confirmed that, under *Mackey*, the fact that a state law imposes an administrative burden on ERISA plan administrators is not dispositive. *Id.* at 483. More importantly, though, the Court emphasized that, under *Fort Halifax*, ERISA does *not* preempt state laws that do not "require the establishment of an ongoing plan," nor does it preempt "a generally applicable statute that makes no reference to, or indeed *functions irrespective of* the existence of an ERISA plan." *Id.* (Emphasis added.) The rule at issue in this case falls within both of those nonpreempted categories: (1) it does not require any employer to establish a training program or any other ERISA plan, and (2) it applies to all employers, whether they have a training program or not.

Emerging from this series of decisions, then, is a structure for deciding whether a state law "relates to" an ERISA plan.[13] Whether and how much a state law burdens or benefits ERISA plans or their administrators is largely immaterial. Instead, as the cases reflect, the key question is as follows: Is the existence of an ERISA plan a

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[13] In many ERISA preemption cases, of course, that will not end the inquiry. Once a court decides that a state law "relates to" ERISA plans, it will often also have to decide whether the state law comes within ERISA's "insurance savings clause," 29 U.S.C. § 1144(b)(2)(A), the "deemer clause," 29 U.S.C. § 1144(b)(2)(B), or the "federal savings clause," 29 U.S.C. § 1144(d).

critical factor in triggering the application of the state law, or does the state law apply whether or not employers have ERISA plans?

In every case where this Court has held that a state law "relates to" ERISA plans, the existence of an ERISA plan has been a *sine qua non* to the application of the state law. Only when employers had set up ERISA plans did the following state laws apply:

– the New Jersey law prohibiting retirement plans from offsetting workers' compensation benefits, struck down in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981);

– the New York law requiring employers with disability benefit plans to provide identical benefits for pregnancy-related disabilities, struck down in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983);

– the Massachusetts law requiring self-funded employee disability plans to provide minimum mental health care benefits, struck down in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985);

– the Georgia law exempting ERISA plans from the state's garnishment law, struck down in *Mackey*, 486 U.S. 825 (1988);

– the Pennsylvania law prohibiting "programs, group contracts, or other arrangements for payment of benefits" from asserting subrogation interests against motor vehicle tort recoveries, struck down in *FMC Corp. v. Holliday*, 111 S.Ct. 403 (1990);

– the Texas cause of action for discharge motivated by an employer's desire to avoid making contributions to

or paying benefits from a pension plan, struck down in *Ingersoll-Rand*, 111 S.Ct. 478 (1990).[14]

On the other hand, in those cases where the Court has upheld state laws against ERISA preemption challenges, the contested measures "functioned irrespective" of the existence of ERISA plans. Even though the state laws in question undoubtedly had some effect on ERISA plans and benefits, the existence of an ERISA plan was irrelevant to the application of:

– the Maine statute requiring employers to make severance payments to employees affected by plant closings, upheld in *Fort Halifax*, 482 U.S. 1 (1987);

– the Georgia law establishing generally applicable garnishment procedures, upheld in *Mackey*, 486 U.S. 825 (1988); and

– the Massachusetts law criminalizing the failure to pay employees for accumulated vacation hours, upheld in *Massachusetts v. Morash*, 109 S.Ct. 1668 (1989).

This critical distinction between state laws of general applicability which are not preempted and state laws that truly "relate to" ERISA plans reflects the Court's understanding that "[i]n enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employer benefits and the failure to pay employees benefits from accumulated funds." *Morash*, 109 S.Ct. at 1673. Given that limited Congressional purpose, then, it makes no sense to extend the reach of

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[14] The same applies to the Mississippi tort and contract actions that the Court refused to allow against plan administrators in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). In *Pilot Life*, however, no one disputed that the lawsuit in question "related to" ERISA plans. *Id.* at 47.

ERISA preemption to state laws that apply generally, or irrespective of the existence of ERISA plans.

The Eighth Circuit decision in this case overlooks that distinction, and therefore conflicts with this Court's prior holdings. Unlike all the state laws struck down by this Court on ERISA preemption grounds, Minnesota's jobsite ratio requirement applies whether or not an employer has an ERISA plan. It is, as the district court correctly concluded, "a law of general application which applies to any jobsite where high-pressure pipefitting is done." App. 27a. As the magistrate acutely observed:

> The rule applies equally to all employers whether they have ERISA plans or not. . . . Employers who have apprenticeship programs will, of course, be affected by the rule. Employers who do not have apprenticeship programs, however, will be affected by the rule, as will the apprentice pipefitters who are not affiliated with any particular employer's apprenticeship training program.

App. 59a.

Moreover, unlike the ERISA preemption cases involving apprenticeship or training in which this Court has denied certiorari, *e.g.*, *Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee*, 891 F.2d 719, 726 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 72 (1990), Minnesota's ratio requirement does not require employers to establish or maintain any particular apprenticeship program. No employer need create any "ongoing plan" to comply with Minnesota's law. Nor does Minnesota's law defeat the expectations of employees in employee benefits, unless one considers the right to work without meeting the minimum qualifications of the job an "employee benefit" Congress intended ERISA to protect.

To the extent Minnesota's rule works to defeat the expectations of employees who want apprentice positions, it is no different than the "ordinary employment risk," *Morash*, 109 S.Ct. at 1673, faced by employees who lack the credentials necessary to get a particular job. The decision below fails to recognize these crucial distinctions.

The Eighth Circuit's confusion, although regrettable, is understandable. At the same time this Court has declared that generally applicable state laws which "function irrespective of the existence of an ERISA plan" are not preempted, *Ingersoll-Rand*, 111 S.Ct. at 483, it also has said that a state law may be preempted "even if the law is not specifically designed to affect such plans, or the effect is only indirect." *Id.* Likewise, while striking down generally applicable state law causes of action only to the extent they apply to employee benefit plans, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), the Court has also, in effect, *insisted* that other generally applicable state remedies must apply to employee benefit plans if they apply to anybody. *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988). If Minnesota had exempted employers with ERISA plans from its pipefitter licensing regulations, it would have clearly run afoul of *Mackey*. Yet, by failing to exempt those employers, Minnesota has, according to the court below, run afoul of *Pilot Life* and *Shaw*. This untenable contradiction can only be resolved by this Court.

The decision below presents this Court with a superb opportunity to take the distinctions implicit in *Fort Halifax* and *Mackey*, and more explicit in the dicta in *Ingersoll-Rand*, and render a decision that will help both the states and the judiciary understand the proper scope of the "relate to" test for ERISA preemption. If this Court

decides this case on the merits, and then holds that ERISA does not preempt generally applicable state laws like this one, which "function irrespective of the existence of an ERISA plan," *Ingersoll-Rand*, 111 S.Ct. at 483, it will have done much to clear up the confusion over ERISA preemption, and to place federal/state relations in this area on the footing Congress intended.[15] On the other hand, permitting the Eighth Circuit decision to stand will leave the courts and the states under the mistaken impression that any state law that might affect the unfettered ability or inclination of employers to provide whatever employee benefits they choose faces extinction under ERISA. That view is clearly contrary to the decisions of this Court, and must be overturned.

Although ERISA litigation has been consuming a greater and greater percentage of the federal courts' docket, of the 68 cases accepted for argument prior to the opening of this Term, none involve ERISA preemption.

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[15] Justice Stevens has provided another alternative: that ERISA only preempts "those state laws that purport to regulate subjects regulated by ERISA or that are inconsistent with ERISA's central purposes." *FMC Corp. v. Holliday*, 111 S.Ct. 403, 412 (Stevens, J., dissenting). As he pointed out last Term, the bill originally introduced in the Senate preempted only state laws that "relate[d] to the subject matters regulated by this Act," S. 4, 93d Cong. 1st Sess. § 609(a)(1973), and the original House bill only preempted state laws relating "to the fiduciary, reporting, and disclosure responsibilities of persons acting on behalf of employee benefit plans." H.R. 2, 93d Cong., 1st Sess. § 114 (1973). According to Justice Stevens, then, it seems likely that Congress intended the final version to be an amalgamation of the language in the two original bills, and not a major expansion. *Id.*

See Review of Supreme Court's Term: Labor and Employment Law, 60 United States Law Week 3117, 3125-26 (August 20, 1991). Moreover, this particular case presents the legal issue in a straightforward way, with no material factual disputes. The arguments on both sides have been fully developed in the lower federal courts, with two thoughtful opinions at the district court level counterbalancing the decision of the court of appeals. As a result, the issue is well suited for this Court's consideration.

III. THE CIRCUIT COURT FAILED TO CONSIDER THE EFFECT OF THE NATIONAL APPRENTICESHIP ACT AND ITS REGULATIONS, WHICH EXPRESSLY ENCOURAGE THE STATES TO ADOPT REGULATIONS EXACTLY LIKE THE ONE HELD TO BE PREEMPTED HERE.

This case also presents this Court with an excellent opportunity to consider the proper scope of ERISA's "savings clause," section 514(d), 29 U.S.C. § 1144(d). Section 514(d) provides that "[n]othing in this chapter shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States . . . or any rule or regulation issued under any such law." Since ratio requirements like Minnesota's are expressly sanctioned by federal regulations under the National Apprenticeship Act of 1937 (the Fitzgerald Act), 29 U.S.C. § 50 (1988), the Eighth Circuit should have considered whether those regulations brought the ratio requirement within ERISA's savings clause, once it had concluded that the rule "related to" ERISA plans.

> The Fitzgerald Act directs the Secretary of Labor: to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of

> such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship [and] *to cooperate with the State agencies engaged in the formulation and promotion of standards of apprenticeship* . . . .

29 U.S.C. § 50 (1988) (emphasis added). The U.S. Labor Department regulations under that Act, in turn, provide that, if a state wishes to secure federal approval for an apprenticeship program, 29 C.F.R. § 29.12, then that state must require that apprenticeship plans specify:

> The numeric ratio of apprentices to journeymen consistent with proper supervision training, safety, and continuity of employment, and applicable provisions in collective bargaining agreements, ... The ratio language shall be specific and clear as to application in terms of jobsite, work force, department, or plant.

29 C.F.R. § 29.5(b)(7). Those federal regulations, then, expressly contemplate that the states will require apprenticeship plans to meet certain minimum standards and indeed those federal regulations expressly require the states to insist that apprenticeship plans specify the ratio of apprentices to journeymen, if that state wants federal certification.

To hold, then, as the Eighth Circuit did in this case, that ERISA preempts Minnesota's ratio requirement is to disregard ERISA's own explicit command that it is not to be construed to "impair" federal laws, rules or regulations. Holding that ERISA *prevents* the states from doing what the Fitzgerald Act regulations *require* for certification simply cannot be reconciled with ERISA's savings clause.

This Court has only once previously considered the proper scope of ERISA's savings clause, in the context of a federal statutory scheme that contemplated *state* regulation to carry out the federal purposes. In *Shaw v. Delta Air Lines, Inc.*, 465 U.S. 85 (1983), the Court had to decide whether ERISA preempted a state fair employment law requiring employers to provide pregnancy benefits. One of the issues was whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., which expressly contemplates state enforcement of employment discrimination laws, brought the state law within ERISA's savings clause.

The Court held that, to the extent the state law was substantively congruent with Title VII, ERISA's savings clause protected it from preemption, even if the state law would otherwise be preempted under the "relates to" test. For example, a state law prohibiting employee benefit plans from discriminating on the basis of race would undoubtedly "relate to" ERISA plans, but, under *Shaw*, it would not be preempted, because preemption would "impair" the federal goal "of encouraging joint state/federal enforcement of Title VII." 463 U.S. at 102. To the extent, however, that a state law prohibited conduct on which the federal statute was neutral, the Court held in *Shaw* that ERISA could preempt because, in that case, preemption would not "impair" federal law. Therefore, since Title VII did not, at that time, require pregnancy benefits, but was instead neutral on the topic, ERISA could preempt the state law without impairing any other federal law.

In this case, unlike the case in *Shaw*, the state law in question imposes a requirement on which the federal law is not neutral. By specifying a journeyman/apprentice

ratio for high-pressure pipefitting, Minnesota was doing exactly, and no more than, what the Fitzgerald Act regulations specify the states are to do. The Eighth Circuit's decision—that ERISA *prevents* Minnesota from doing what the Fitzgerald Act *encourages*—construes ERISA to "impair" federal law, contrary to ERISA's savings clause.

The previous cases that have come to this Court, in which the issue has been ERISA preemption of state laws affecting apprenticeship, have all involved state regulations going well beyond the minimum requirements of the Fitzgerald Act Regulations. *E.g., Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee,* 891 F.2d 719 (9th Cir. 1989), *cert. denied,* 111 S.Ct. 72 (1990) (state law requiring employers performing state public works projects to agree to join and abide by all of the requirements of particular private apprenticeship programs); *General Electric Co. v. New York State Department of Labor,* 891 F.2d 25 (2d Cir. 1989), *cert. denied,* 110 S.Ct. 2603 (1990) (New York prevailing wage requirement that public works contractors make financial contributions to particular private apprenticeship program); *Local Union 598, Plumbers & Pipefitters Industry Journeymen & Apprentices Training Fund v. J.A. Jones Construction Co.,* 846 F.2d 1213 (9th Cir.), *aff'd mem.* 109 S.Ct. 210 (1988) (same). Unlike the regulations in question in those cases, Minnesota's jobsite ratio requirement does not extend beyond what the Fitzgerald Act regulations expressly contemplate.

This case therefore, presents this Court with an ideal opportunity, not only to clarify the breadth of ERISA's preemption clause, but also to articulate the proper scope of the statute's savings clause as well. A decision by this Court on the merits would give necessary guidance to

both the federal government and the states in cases in which the states are acting pursuant to federal guidelines, but where their actions might have some effect on employee benefit plans.

CONCLUSION

For the reasons stated above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 90-5238

Boise Cascade Corporation, a Delaware corporation, BE&K Construction Company, a Delaware corporation, Charles L. Lee, Relco Unisystems Corporation, a Minnesota corporation, Forrest Dahmes, Mid-States Mechanical Services, Inc., a Minnesota corporation, and Kristine Southard, Appellants, v. Kenneth Peterson, Commissioner of the Department of Labor and Industry, State of Minnesota, Appellee, and Minnesota Mechanical Contractors Association, Intervenor.	Appeal from the United States District Court for the District of Minnesota

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Submitted: October 8, 1990

Filed: July 29, 1991

Before McMILLIAN, WOLLMAN and BEAM, Circuit Judges.

McMILLIAN, Circuit Judge.

Plaintiffs Boise Cascade Corp., BE&K Construction Co. (BE&K), Charles L. Lee, Relco Unisystems Corp., Forrest Dahmes, Mid-States Mechanical Services, Inc., and Kristine Southard appeal from a final order entered in the District Court for the District of Minnesota granting summary judgment in favor of Kenneth Peterson, Commissioner of the Minnesota Department of Labor and Industry. The district court held that a state rule[1] regulating the ratio of licensed pipefitters to apprentices working on Minnesota jobsites was not preempted by either the Employee Retirement Income Security Act, as amended, 29 U.S.C. §§ 1001-1381 (ERISA), or the National Labor Relations Act, as amended, 29 U.S.C. §§ 157-158 (NLRA). *Boise Cascade Corp. v. Peterson*, 735 F. Supp. 1434

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[1] The minimum ratio rule, as amended, provides in part:

All persons learning the trade of pipefitting shall be under the direct supervision of a contracting or journeyman pipefitter. The minimum ratio of pipefitter trainees to licensed pipefitters on the jobsite shall be:

> A. One pipefitter trainee for the first licensed pipefitter; and
>
> B. One pipefitter trainee for every additional three licensed pipefitters after that; provided that at least one journeyman or contracting pipefitter must be on the jobsite at all times when work is in progress.

Minn. R. pt. 5230.0110, subpt. 2a (1990).

(D. Minn. 1990) (memorandum and order). For reversal, plaintiffs argue the district court erred in holding that the state rule was not preempted by ERISA, the NLRA or both. For the reasons discussed below, we reverse the order of the district court.

The underlying facts are not disputed. The following background information is taken in large part from the memorandum opinion of the district court.

This case arises out of the efforts of the state of Minnesota to regulate the training of pipefitter apprentices.[2] Minnesota has regulated high-pressure pipefitting (formerly known as steamfitting) since 1937. *See* Minn. Stat. §§ 326.46-.52 and Minn. R. pt. 5230. High-pressure pipefitting is a very dangerous activity; most of the work is not visible when residential or commercial construction is completed, and poor work can cause explosions. The state's regulatory scheme includes both an extensive technical code establishing minimum requirements for the design, testing and installation of high-pressure piping and provisions for the licensing of pipefitters. There are two types of pipefitter licenses: contracting steamfitters and journeymen steamfitters. Only licensed pipefitters and apprentices working under the supervision of a licensed pipefitter can install high-pressure piping. "Contracting steamfitters" are qualified to plan and oversee the installation of high-pressure piping and to employ journeymen steamfitters. "Journeymen steamfitters" can

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[2] The amended rules refer to apprentices as pipefitter trainees.

install high-pressure piping in the employ of a contracting steamfitter. Unlicensed apprentices work under the supervision of licensed pipefitters. However, apprentices must either register with the state code enforcement division or enroll in an apprenticeship training program approved by the state division of voluntary apprenticeship. The state division of voluntary apprenticeship approves only those programs that meet certain minimum standards. As early as 1946, these minimum standards included a minimum jobsite ratio of journeymen to apprentices. Since 1973, the minimum standards have specified no more than one journeyman for the first apprentice and then three journeymen for each additional apprentice on the jobsite. The minimum standards also require 4 years of vocational education. Many collective bargaining agreements contained the minimum jobsite ratios of journeymen to apprentices.

Some non-union employers have established their own pipefitter apprenticeship programs outside the control of the state division of voluntary apprenticeship. These programs do not require a minimum jobsite ratio of journeymen to apprentices. Instead each employer determines the ratio of journeymen to apprentices for each jobsite according to the complexity of the work at that jobsite and the experience and ability of the particular individuals available. However, in general, the ratio of journeymen to apprentices on non-union jobsites is substantially lower than the 3 to 1 ratio specified by collective bargaining agreements and the state division of voluntary apprenticeship. Employers who hire apprentice pipefitters do not have to establish an apprentice training program, but all apprentices must be registered with the

state code enforcement division (which keeps track of apprentices' on-the-job experience) and must take the licensing exam after 4 years of experience.

Until 1985-1986 almost all pipefitter apprentices were trained in programs where the jobsite ratio of journeymen to apprentices was at least 3 to 1. However, in the mid-to-late 1980s more non-union employers began establishing apprenticeship training programs which did not comply with the voluntary apprenticeship program minimum standards, particularly the 3 to 1 ratio of journeymen to apprentices. The state department of labor and industry questioned whether pipefitter apprentices working for non-union employers were receiving adequate training or working under adequate supervision. The state's concern was exacerbated by Boise Cascade's selection of a non-union contractor (BE&K) as general contractor for the $535 million expansion of its manufacturing facility located in International Falls, MN.

In May 1988 the commissioner of the state department of labor and industry initiated rulemaking proceedings on pipefitter apprenticeship training standards. In June 1989 the state department of labor and industry published a proposed rule adopting the 1 to 1 and 3 to 1 ratios for journeymen and apprentice pipefitters on the jobsite. After an administrative hearing, a state administrative law judge found that the state department of labor and industry had demonstrated a need for the minimum jobsite ratio rule and that the rule was rationally related to its ends. The proposed rule was adopted on January 22, 1990, to be effective on February 1, 1990. The rule did not contain a grandfather clause exempting construction projects already in progress on the effective date. The

state had argued that the minimum jobsite ratios were necessary because of the grave danger to the public posed by the improper installation of high-pressure piping and the inadequacy of the training and supervision received by apprentices working for non-union employers.

On January 23, 1990, plaintiffs filed this action in federal district court seeking a declaration that the minimum jobsite ratio rule was preempted by ERISA and the NLRA and to enjoin implementation of the minimum jobsite ratio rule. On January 31, 1990, the district court granted a temporary restraining order (TRO)[3] against enforcement of the minimum jobsite ratio rule and, with the consent of the parties, consolidated the motions for preliminary and permanent injunctive relief and referred the consolidated motions for injunctive relief, as well as the state's motion for summary judgment, to a magistrate judge for a hearing and report and recommendation. The magistrate judge recommended granting summary judgment in favor of the state, and plaintiffs filed objections.

The district court granted summary judgment in favor of the state and denied plaintiffs' consolidated motions for preliminary and permanent injunctive relief. The district court held that the minimum jobsite ratio rule

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[3] The state appealed the issuance of the TRO, arguing that the TRO was in fact a preliminary injunction and therefore immediately appealable under 28 U.S.C. § 1291(a). We disagreed with the state, held that the district court's order was a TRO and not a preliminary injunction, and accordingly dismissed the appeal for lack of jurisdiction. *Boise Cascade Corp. v. Peterson*, No. 90-5086MN (8th Cir. Mar. 30, 1990) (order).

was not preempted by either ERISA or the NLRA. 735 F. Supp. at 1438-43. The district court held that ERISA did not preempt the minimum jobsite ratio rule because the rule was one "of general application concerning [occupational training and public safety,] . . . subject[s] traditionally reserved to the states[,] which has no implications for ERISA's regulatory concerns and only an incidental effect on the administration of training programs. . . . [and which] in no way threatens the administrative integrity of employee benefit plans." *Id.* at 1441. The district court also held that the NLRA did not preempt the minimum jobsite ratio rule because the rule did not interfere with either the primary jurisdiction of the National Labor Relations Board over what is and what is not an unfair labor practice, *id.* at 1442, *citing San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), or the collective bargaining process. 735 F. Supp. at 1442-43, *citing Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976).

The district court denied plaintiffs' motion to continue the TRO pending appeal but, in the interests of justice, continued the TRO for 14 days to enable plaintiffs to file an appeal and seek a stay pending appeal from this court. This appeal followed. This court granted plaintiffs' motion for a stay pending appeal, thus continuing in effect the TRO against state enforcement of the minimum jobsite ratio rule, and expedited the appeal.

STANDARD OF REVIEW

We review summary judgments de novo. *E.g., Agri-Stor Leasing v. Farrow*, 826 F.2d 732, 734 (8th Cir. 1987);

accord Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Comm., 891 F.2d 719, 726 (9th Cir. 1989) (*Hydrostorage*), *cert. denied*, 111 S. Ct. 72 (1990). In the present case, because the underlying facts are not disputed, the issue is a legal one involving statutory interpretation, that is, whether the state's minimum jobsite ratio rule is preempted by ERISA, the NRLA [sic] or both. *See Local Union 598, Plumbers & Pipefitters Industry Journeyman & Apprentices Training Fund v. J.A. Jones Construction Co.*, 846 F.2d 1213, 1218 (9th Cir.) (*Jones*) (ERISA preemption is question of federal law involving statutory interpretation and is reviewed de novo), *aff'd mem.*, 488 U.S. 881 (1988).

ERISA PREEMPTION

For reversal, plaintiffs argue the district court construed the ERISA preemption clause too narrowly. Plaintiffs argue that because the minimum jobsite ratio rule directly affects the administration and cost of their apprenticeship training programs, the rule clearly "relates to" an "employee benefit plan" and is thus preempted. The state argues ERISA does not preempt all state laws that affect employee benefit plans and that the district court correctly followed the analytical framework set forth in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (*Fort Halifax*). The state argues that the minimum jobsite ratio rule involved occupational training and public safety, two areas of traditional state regulation, and that the effect of the rule on the pipefitter apprenticeship program was "too tenuous, remote and peripheral" to warrant preemption. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983). Although we agree with much of the

district court's preemption analysis, we think the district court failed to differentiate between a "benefit" and a "plan" and thus underestimated the scope of ERISA pre-emption.

"In determining whether federal law pre-empts a state statute, we look to congressional intent." *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990). "Pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 95 (internal citations omitted). ERISA is "a comprehensive remedial statute 'designed to protect the interest of employees in pension and welfare plans, and to protect employers from conflicting and inconsistent state and local regulation of such plan.' " *Jones*, 846 F.2d at 1217 (internal citation omitted). ERISA contains a very broad preemption clause. Section 514(a) of ERISA, 29 U.S.C. § 1144(a), provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." The Supreme Court has noted that the ERISA preemption clause is "conspicuous for its breadth" and "establishes as an area of exclusive federal concern the subject of every state law that 'relate[s] to' an employee benefit plan governed by ERISA." *FMC Corp. v. Holliday*, 111 S. Ct. at 407. In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 96-97 (footnote omitted), the Supreme Court held that "[a] [state] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan."

As a preliminary matter, we note that the minimum jobsite ratio rule is a "state law" for purposes of ERISA

preemption analysis. *See Hydrostorage*, 891 F.2d at 729. Title 29 U.S.C. § 1144(c) defines "state laws" as "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State."

We also note that the state has conceded that plaintiffs' pipefitter apprenticeship programs are "employee welfare benefit plans" as defined by ERISA. 735 F. Supp. at 1438; *see* 29 U.S.C. § 1002(1); *Hydrostorage*, 891 F.2d at 728 (concluding that boilermaker apprenticeship standards, which included a maximum ratio of apprentices to journeymen on job locations, were an integral part of a larger "program" established for the purpose of providing "apprenticeship . . . training" and thus fell within the definition of an "employee welfare benefit plan" under ERISA). We think the fact that the minimum jobsite ratio rule is part of an apprenticeship program and thus part of an employee benefit "plan" under ERISA, not merely an employee benefit, distinguishes the present case from *Fort Halifax*, a case heavily relied upon by the district court. The difference between a "plan" and a "benefit" was critical to the Supreme Court's decision in *Fort Halifax*. 482 U.S. at 6-8. In that case the Court concluded that because the Maine severance pay statute created an employee benefit and neither established nor required an employer to maintain an employee welfare benefit "plan," it was not preempted by ERISA because ERISA's preemption provision referred only to state laws relating to "employee benefit plans," not to state laws relating to "employee benefits." *Id.* at 7-8, *citing* 29 U.S.C. § 1144(a).

We conclude that the minimum jobsite ratio rule "relates to" employee benefit plans covered by ERISA, that is, plaintiffs' apprenticeship programs, within the

meaning of ERISA's § 514(a). *See Hydrostorage*, 891 F.2d at 729-31. The minimum jobsite rule was specifically designed to affect employee benefit plans. The very purpose of the minimum jobsite ratio rule was to require plaintiffs and other employers to train their apprentices in accordance with the minimum jobsite ratio rule. Application of the minimum jobsite ratio rule would also have exposed plaintiffs and other employers to conflicting or inconsistent state and local regulations. "[W]here a 'patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation,' [the Supreme Court has] applied the preemption clause to ensure that benefit plans will be governed by only a single set of regulations." *FMC Corp. v. Holliday*, 111 S. Ct. at 408, *citing Fort Halifax*, 482 U.S. at 11; *see Shaw v. Delta Air Lines, Inc.*, 463 U.S. 95-100. The fact that the minimum jobsite ratio rule "in no way threatens the administrative integrity of employee benefit plans," as found by the district court, 735 F. Supp. at 1441, is not dispositive. The Supreme Court in *Shaw v. Delta Air Lines, Inc.* rejected the view that the scope of ERISA preemption is limited to "only state laws dealing with the subject matters covered by ERISA – reporting, disclosure, fiduciary responsibility, and the like." 463 U.S. at 98; *see also FMC Corp. v. Holliday*, 111 S. Ct. at 408.

TRADITIONAL STATE REGULATION

The state argues on appeal that the minimum jobsite ratio rule is "a rule of general application concerning a subject traditionally reserved to the states which has no implications for ERISA's regulatory concerns and only an

incidental effect on the administration of training programs." 735 F. Supp. at 1441. The state argues that "Congress did not intend [ERISA] to pre-empt areas of traditional state regulation." *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 740 (1985). The state defends the minimum jobsite ratio rule as "an occupational training requirement enacted to protect public safety," 735 F. Supp. at 1441, and argues that the rule is not preempted because it affects the apprenticeship programs in "too tenuous, remote, or peripheral a manner to warrant a finding that the [rule] 'relates to' the plan[s]." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 100 n.21, *citing American Telephone & Telegraph Co. v. Merry*, 592 F.2d 118, 121 (2d Cir. 1979) (garnishment).

We agree that the minimum jobsite ratio rule is an exercise of traditional state regulatory power over occupational training. However, we cannot agree that its effect on the apprenticeship programs is so tenuous, remote or peripheral as to allow us to conclude it does not "relate to" them. The minimum jobsite ratio rule directly affects an ERISA plan: it regulates, and was clearly intended to regulate, certain terms and conditions of the apprenticeship programs by establishing the manner in which employers can train and employ both journeymen and apprentice pipefitters. *See Hydrostorage*, 891 F.2d at 729 (holding state scheme requiring employer participation and contribution to apprenticeship program "related to" ERISA plan); *Jones*, 846 F.2d at 1220-21 (state statute requiring contributions to apprenticeship training fund at rate in excess of that provided by collective bargaining agreement held preempted by ERISA); *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320, 327-28 (2d Cir. 1985)

(state wage collection statute which required severance pay held preempted by ERISA), *aff'd mem.*, 477 U.S. 901 (1986); *cf. Retirement Trust Fund v. Franchise Tax Board*, 909 F.2d 1266, 1280-86 (9th Cir. 1990) (state tax collection procedures not preempted by ERISA; however, state tax levy prohibited by ERISA anti-alienation provision); *Aetna Life Insurance Co. v. Borges*, 869 F.2d 142, 145-49 (2d Cir.) (state escheat law not preempted by ERISA), *cert. denied*, 110 S. Ct. 57 (1989).

We hold the minimum jobsite ratio rule is preempted because it "relates to" an ERISA plan. Because we reverse the district court's order on the grounds that the minimum jobsite ratio rule is preempted by ERISA, we need not reach the issue of NLRA preemption.

Accordingly, the order of the district court is reversed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Boise Cascade Corporation, a Delaware corporation, BE&K Construction Company, a Delaware corporation, Charles L. Lee, Relco Unisystems Corporation, a Minnesota corporation, Forrest Dahmes, Mid-State Mechanical Services, Inc., a Minnesota corporation, Kristine Southard,

Plaintiffs,

v.

Kenneth Peterson, Commissioner of the Department of Labor and Industry, State of Minnesota,

Defendant.

and

Minnesota Mechanical Contractors Association, Inc.

Intervenor.

CIVIL
4-90-48

MEMORANDUM
AND ORDER

David P. Pearson, Lloyd W. Grooms, Winthrop & Weinstine, 3200 Minnesota World Trade Center, 30 East Seventh Street, St. Paul, MN 55101, for plaintiffs Boise Cascade Corp., BE&K Construction Co. and Charles L. Lee.

Lowell J. Noteboom, Robert P. Thavis, Leonard, Street & Deinard, Suite 2300, 150 South Fifth Street, Minneapolis, MN 55402, for plaintiffs

Relco Unisystems Corp., Forrest Dahmes, Mid-States Mechanical Services, Inc. and Kristine Southard.

Hubert H. Humphrey, III, Minnesota Attorney General, and Scott R. Strand, Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, MN 55155, for defendant.

Marshall H. Tanick, Teresa J. Ayling, Mansfield & Tanick, 620 National City Bank Building, 510 Marquette Avenue, Minneapolis, MN 55402, for intervenor.

Plaintiffs have filed suit to enjoin implementation of a state administrative rule mandating a specific minimum ratio of licensed journeymen pipefitters for each apprentice pipefitter at all jobsites where high pressure pipefitting is being performed.[1] Plaintiffs argue that the rule is

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[1] The rule requires that the first unlicensed apprentice on a high pressure pipefitting jobsite be accompanied by at least one licensed pipefitter and that there be at least three licensed pipefitters for every unlicensed apprentice after the first. The full text of the rule is as follows:

> All persons learning the trade of pipefitting shall be under the direct supervision of a contracting or journeyman pipefitter. The minimum ratio of pipefitter trainees to licensed pipefitters on the jobsite shall be:
>
> A. One pipefitter trainee for the first licensed pipefitter; and
>
> B. One pipefitter trainee for every three licensed pipefitters after that;

(Continued on following page)

preempted both by the Employee Retirement Income Security Act (ERISA) and the National Labor Relations Act (NLRA). On the motion of the plaintiffs, the Court issued a temporary restraining order which enjoined the defendant from implementing or enforcing the new rule. The case was subsequently referred to the United States Magistrate for a report and recommendation on plaintiff's motion for preliminary and permanent injunctive relief as well as defendant's motion for summary judgment. In his March 30, 1990 report and recommendation, the Magistrate recommended that the Court deny plaintiff's motions for injunctive relief and grant defendant's motion for summary judgment. Plaintiffs' objections to the report and recommendation are now before the Court.

FACTS

Beginning in 1937, Minnesota has regulated high pressure pipefitting, formerly known as steamfitting. *See* Minn. Stat. §§ 326.46 – .52 and Minn. Rules Pt. 5230. The regulatory scheme includes both an extensive technical code establishing minimum requirements for the design, testing and installation of high-pressure piping and provisions for the licensing of pipefitters.

There are two types of pipefitter licenses. "Contracting steamfitters" are qualified to plan and oversee the

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(Continued from previous page)

provided that at least one journeyman or contracting pipefitter must be on the jobsite at all times when work is in process.

Minn. Rules Pt. 5230.0110, subp. 2a.

installation of high-pressure pipefitting and to employ journeyman steamfitters. Minn. Rules Pt. 5230.0040, subpt. 1 and Pt. 5230.0070. "Journeymen steamfitters" may install high-pressure piping in the employ of a contracting steamfitter. Minn. Rules Pt. 5230.0040, subpt. 3. The rules also provide for unlicensed apprentices[2] who work under the supervision of licensed pipefitters. Minn. Rules Pt. 5230.0040, subpt. 4. Apprentices must either be registered with the Code Enforcement Division or enrolled in an apprenticeship training program recognized by the Division of Voluntary Apprenticeship.[3] Minn. Rules Pt. 5230.0110, subpt. 1.

The Division of Voluntary Apprenticeship approves only those programs that meet certain minimum standards. As early as 1946 these standards included a minimum ratio of journeymen to apprentices. Since 1973, the standards have called for no more than one apprentice for the first journeyman plus one additional apprentice for each additional three journeymen.[4] Affidavit of Robert L. Wickland, ¶8, Exh. C. The standards also require four years of education at a vocational-technical institute.

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[2] The amended rules refer to apprentices as "pipefitter trainees."

[3] A person must have four years of experience in the pipefitting trade and pass an examination in order to be licensed as a journeyman pipefitter. Minn. Rules Pt. 5230.0080. The experience requirement may be met as an apprentice in Minnesota or through pipefitting work done in another state. Affidavit of B. James Berg ¶4.

[4] Requests for a variance from this ratio requirement are considered "on an individual basis." Affidavit of Robert L. Wickland ¶8.

Affidavit of Lloyd W. Grooms, Exh. 6 (Report of the Administrative Law Judge) at 6. While the terms of the collective bargaining agreements with pipefitter unions vary slightly, the parties agree that the agreements generally require the same 3-to-1 ratio.[5] It is no coincidence then that, although any employer can establish state-recognized voluntary apprenticeship programs, so far all such programs have been established by union employers or unions. Grooms Aff. Exh. 6 at 7.

Some non-union employers have established their own pipefitter apprenticeship programs outside the aegis of the Division of Voluntary Apprenticeship. These programs are less formal than the state-recognized programs, but do offer class work to complement the apprentice's on-the-job training. Grooms Aff. Exh. 6 at 8; Affidavit of W. Douglas Cross ¶7; Affidavit of Kent Durenberger Exh. 1. These programs do not have any fixed ratio of journeymen to apprentices. *See* Cross Aff. ¶3; Affidavit of Loren Cole ¶3; Durenberger Aff. at 3. The ratio of journeymen to apprentices at any particular jobsite is determined by the complexity of the task at hand and the experience and ability of the particular individuals available. The ratio of journeymen to apprentices in non-union training programs tends to be substantially below three-to-one. Grooms Aff. Exh. 6 at 8.

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[5] Plaintiff Boise Cascade has an agreement with the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local No. 771 which provides that the terms and conditions of the apprenticeship program will be established through future bargaining. Affidavit of Bob Anderson Exh. C at UA-Ex. B-1.

An employer who hires apprentice pipefitters need not establish an apprentice training program. Minnesota requires only that the apprentices be registered with the Code Enforcement Division and that they be ready to take the test, through their own study or employer-sponsored instruction, after four years of experience in the pipefitting trade. Minn. Rule Pt. 5230.0110, subpt. 1.

Until 1985-86, almost all pipefitter apprentices participated in voluntary apprenticeship programs where the ratio of journeymen to apprentices was at least 3-to-1. Grooms Aff. Exh. 6 at 9. That changed in the last several years as non-union employers began establishing apprenticeship training programs which did not comply with the voluntary apprenticeship program's standards.[6] The Department of Labor and Industry ultimately came to question whether pipefitter apprentices were working under adequate supervision. Grooms Aff. Exh. 6 at 9.

On May 16, 1988, the Commissioner of Labor and Industry initiated rulemaking procedures by soliciting information and opinions in conjunction with efforts to prepare an amendment to the rules governing high-pressure piping. 12 State Register 2518. On June 12, 1989, the department published a proposed rule requiring the same ratio of journeymen to apprentices eventually adopted. 13

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[6] For example, plaintiff Relco Unisystems Corporation employs one contracting pipefitter, two journeymen pipefitters and twenty apprentices. Cole Aff. ¶2. Plaintiff Mid-States Mechanical Services employs one contracting pipefitter, one journeyman pipefitter and nine apprentices. Durenberger Aff. ¶2. BE&K employs approximately ten licensed pipefitters and twenty apprentices at the Boise Cascade expansion project. Cross Aff. ¶8.

State Register 2928. The rule will hereinafter be referred to as the 3-to-1 rule.[7] Because a sufficient number of requests for a hearing were received, the proposed rule was republished on August 21, 1989 with notice of a hearing one month later.[8] 14 State Register 357. After the hearing, and based upon the entire record developed during the course of rulemaking proceedings, the Administrative Law Judge (ALJ) found that the agency had demonstrated a need for the proposed rule and that the rule was rationally related to its ends. The rule was adopted on January 22, 1990. 14 State Register 1878.

The rule was found to be necessary and reasonable because of the danger posed by improperly installed high-pressure piping and the department's substantiated concerns about the adequacy of the training and supervision received by apprentices at non-union shops. Grooms Aff. Exh. 6 ¶¶15-17, 27. The state cannot observe all high-pressure pipefitting work as it is being done. Inspectors do make inspections both during and after construction,

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[7] The rule in fact allows one apprentice for the first journeyman pipefitter and then one additional apprentice for every three journeymen. See footnote one for the text of the rule.

[8] This was shortly after the inception of a labor dispute concerning the $535 million expansion of Boise Cascade's manufacturing facility in International Falls, Minnesota. Boise Cascade hired BE&K as the general contractor for the project. Labor organizations have protested this choice because BE&K is a non-union contractor.

While plaintiffs concede that the motivation for the rule is irrelevant to the legal questions presented by their suit, the claim that the rule is merely a means through which the state has sought to interfere in their labor dispute underlies their argument.

but once a pipefitting job is completed much of the work is no longer visible. Grooms Aff. Exh. 6 ¶25; Affidavit of Charles Fritze, Jr. ¶5. Defects may go undetected until the piping ruptures or explodes. Grooms Aff. Exh. 6 ¶¶16-17, 33; Fritze Aff. ¶5. The 3-to-1 rule is intended, not just to assure that apprentice pipefitters receive adequate training, but also to assure that high-pressure piping is safely installed by either licensed pipefitters or adequately supervised apprentices. Grooms Aff. Exh. 6 ¶¶27, 44. The department's decision to adopt a 3-to-1 ratio was found to be supported by past experience with that rule in the pipefitting trade. *Id.* at ¶¶29-33, 44.

Plaintiffs allege that the 3-to-1 rule is preempted by ERISA and/or the NLRA. As mentioned earlier, the Magistrate analyzed these claims and recommended that the Court grant summary judgment in favor of the defendant.

DISCUSSION

I. ERISA Preemption

The Employee Retirement Income Security Act (ERISA) of 1974 is a comprehensive remedial statute designed to protect "the continued well-being and security of the millions of employees and their dependants . . . directly affected by" employee benefit plans. 29 U.S.C. § 1001(a). The statute protects these interests through substantive requirements imposed upon pension plans relating to participation, funding and vesting, and also through uniform procedural standards governing reporting, disclosure and fiduciary responsibilities for both pension and welfare benefit plans. *Shaw v. Delta Air*

Lines, Inc., 463 U.S. 85, 91 (1983). The statute also contains a broad preemption provision intended to "round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation." Statement of Representative Dent, 120 Cong.Rec. 29197, *quoted in Fort Halifax Packaging Co. v. Coyne*, 107 S.Ct. 2211, 2216 (1987).

ERISA's preemption provision is section 514(a), codified at 29 U.S.C. § 1144(a). It states:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter *shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan* described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

(Emphasis added.) Section 514(b) excludes specified types of state laws, primarily insurance, banking, and securities laws, from the preemption clause.

By making the regulation of employee benefit plans exclusively federal, Congress intended to provide for the efficient, uniform administration of those plans.

> An employer that makes a commitment systematically to pay certain benefits undertakes a host of obligations, such as determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records in order to comply with applicable reporting requirements. The most efficient way to meet these responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to

> guide processing of claims and disbursement of benefits. Such a system is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing States. A plan would be required to keep certain records in some States but not in others; to make certain benefits available in some States but not in others; to process claims in a certain way in some States but not in others; and to comply with certain fiduciary standards in some States but not in others.

Fort Halifax, 107 S.Ct. at 2216.

ERISA specifically defines employee welfare benefit plans to include any "plan, fund or program" established or maintained by an employer or employee organization or both for the purpose of providing participants with "apprenticeship or other training programs." 29 U.S.C. § 1002(1). For the purposes of this motion, defendant concedes that plaintiffs' pipefitter apprenticeship programs are employee welfare benefit plans as defined by ERISA. March 30, 1990 Report and Recommendation at 9.

The 3-to-1 rule is preempted if, under section 514(a), it "relates to" an employee benefit plan. This preemption provision has a broad scope, not limited to laws specifically designed to affect employee benefit plans. A state law "relates to" employee benefit plan "in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983); *see also Baxter v. Lynn*, 886 F.2d 182, 185 (8th Cir. 1988). The limits of section 514(a)'s scope has often been litigated but is not yet clearly defined. It is nevertheless certain that the statute does not preempt all state laws which affect employee benefit plans. *See, e.g.*,

Mackey v. Lanier Collections Agency & Service, 108 S.Ct. 2182, 2185-91 (1988) (generally applicable garnishment law under which creditors can garnish ERISA welfare benefits); *Fort Halifax*, 107 S.Ct. 2211 (law requiring companies to make lump-sum severance payments when closing a plant); *Aetna Life Insurance Co. v. Borges*, 869 F.2d 142 (2d Cir.) (state escheat law which has administrative and economic impact on ERISA plans because it forced the plans to pay unclaimed benefits to the state), *cert. denied*, 110 U.S. 57 (1989); *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550 (6th Cir. 1987) (city income tax of general application that affects employee contributions to benefit plans); *Rebaldo v. Cuomo*, 749 F.2d 133 (2d Cir. 1984) (law prescribing what hospitals can charge for inpatient care,, thereby preventing benefit plans from negotiation their own discount rates), *cert. denied*, 472 U.S. 1008 (1985). Moreover, where section 514(a) may encroach on areas of traditional state regulation the Supreme Court has held that interpretation of that section "must be guided by respect for the separate spheres of governmental authority preserved in our federalist system." *Allesi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981).

The 3-to-1 rule at issue here presents an interesting question concerning the states' ability, in light of section 514(a), to regulate two related areas traditionally reserved to the states—occupational training and public safety. The 3-to-1 rule is an effort by Minnesota to regulate the training of apprentice pipefitters and will necessarily affect pipefitter training programs. The rule also constitutes an effort by the state to assure that high pressure piping is installed safely. It is a law of general application

which applies to any jobsite where high pressure pipefitting is done. It does not require any employers to create or fund an ERISA plan nor does it affect any other primary administrative functions regulated by ERISA. Nevertheless, it does limit the numbers of persons who can participate in plaintiffs' ERISA plans and, to some extent, it determines the manner in which those plans deliver benefits.

In *Fort Halifax*, 107 S.Ct. 2211, the Supreme Court provided a framework for analyzing whether a state law falls within the scope of ERISA's preemption clause. In that case, the state law at issue was evaluated in light of the language of section 514(a), the underlying purpose of the preemption provision, and the overall objectives of ERISA itself. 107 S.Ct. at 2215.

The statute at issue in *Fort Halifax* required employers who closed a plant with 100 or more employees to provide severance payments to the displaced workers. The amount of the payments was determined by the employee's salary and the number of years he or she was employed at the plant. Examining the language of section 514(a), the Supreme Court rejected the appellant's argument that ERISA preempted all state legislation regarding employee benefits. 107 S.Ct. at 2215.

> ERISA's pre-emption to provision does not refer to state laws relating to "employee benefits," but to state laws relating to "employee benefits *plans*". . . . The words "benefit" and "plan" are used separately throughout ERISA, and nowhere in the statute are they treated as the

> equivalent of one another. Given the basic difference between a "benefit" and a "plan," Congress' choice of language is significant in its preemption of only the latter.

107 S.Ct. at 2215-16.

The second factor considered in *Fort Halifax* was whether preemption of the state law would further the purpose of ERISA's preemption clause. The preemption provision foreclosed the possibility of a "patchwork scheme of regulation [which] would introduce considerable inefficiencies in benefit program operation." 107 S.Ct. at 2217.

> Pre-emption ensures that *the administrative practices of a benefit plan* will be governed by only a single set of regulations.

107 S.Ct. at 2217 (emphasis added). *Accord, Borges*, 869 F.2d at 146-47 ("What triggers ERISA preemption is not just any indirect effect on administrative procedures but rather an effect on the primary administrative functions of benefit plans, such as determining an employee's eligibility for a benefit and the amount of that benefit."); *Martori Brothers Distributors v. James-Massengale*, 781 F.2d 1349, 1356-57 (9th Cir. 1986) (the principle underlying judicial interpretation of section 514(a) is that state law is preempted "if it regulates the matters regulated by ERISA: disclosure, funding, reporting, vesting, and enforcement of benefit plans"), *opinion amended*, 791 F.2d 799 (9th Cir.), *cert. denied*, 479 U.S. 949 (1986).

The third factor considered in *Fort Halifax* was whether the state law implicates the regulatory concerns of ERISA itself. ERISA was enacted to safeguard the

interests of plan participants and their beneficiaries in the operation of employee benefit plans. 107 S.Ct. at 2219. To the extent any state law threatens the "administrative integrity of benefit plans," it runs afoul of the statute's regulatory concerns. 107 S.Ct. at 2219. This would include any state law which would put the employer "to the choice of operating separate ongoing benefit plans or a single plan subject to different regulatory requirements" in various states. 107 S.Ct. at 2220.

Applying the *Fort Halifax* analysis to the rule at issue in this case, the Court notes first that the 3-to-1 rule neither requires employers to establish benefit plans nor is "specifically designed to affect" such plans. The rule is a law of general application which applies to any jobsite where apprentice pipefitters are working without regard to whether they are participating in an apprenticeship program.

To determine whether the rule "relates to" an employee benefit plan, *Fort Halifax* directs the Court to look at the purpose of the ERISA preemption clause and the underlying regulatory concerns of ERISA. The 3-to-1 rule does not implicate any of the administrative practices regulated by ERISA. It does not alter the terms of eligibility or the amount of benefits to be distributed to a participant. It does not impose any funding, vesting, reporting or enforcement requirements. Accordingly, the rule has no effect on "the primary administrative functions of a benefit plans," *Borges*, 869 F.2d at 146. Because the rule mandates a specific "teacher-student" ratio, it does however have an incidental effect on the plans' administration procedures. This limits the number of participants in the training program and affects how training

can be done. It also imposes higher costs on plan administrators who must hire more journeymen to supervise their apprentices.

Plaintiffs focus their argument for preemption on the impact of the rule on their plan. They argue that any state law whose impact which is not tenuous, remote or peripheral was intended to be preempted. Plaintiffs also argue that the rule is preempted because it directly regulates a "term" of their training programs.

The scope of section 514(a) is not determined solely by the impact a state law has on employee benefit plans. While a number of courts have borrowed the "too tenuous, remote or peripheral" language from *Shaw* to express their conclusion that a state law is not preempted by ERISA,[9] the courts have not limited their section 514(a) analysis to an attempt to measure the degree of the challenged law's effect. A number of state laws which impose substantial administrative burdens and increased costs for ERISA plans have been found outside the scope of section 514(a). *See* citations *supra* at 10-11.

Plaintiffs' next argument presents a closer question. Plaintiffs cite *Shaw* and *Baxter v. Lynn*, 886 F.2d 182

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[9] In a footnote, the *Shaw* Court stated:

> Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law "relates to" the plan. The present litigation plainly does not present a borderline question, and we express no views about where it would be appropriate to draw the line.

103 S.Ct. at 2901 n.21 (citation omitted).

(8th Cir. 1989) for the proposition that any state law which regulates a "term" of an employee benefit plan must be preempted. In *Shaw*, the Supreme Court found that two New York statutes came within section 514(a): a human rights statute which prohibited employers from structuring benefit plans in a manner which discriminated on the basis of pregnancy and a disability benefits statute which required employers to pay sick-leave benefits to employees unable to work because of pregnancy. In *Baxter*, the United States Court of Appeals for the Eighth Circuit considered whether Missouri's common law rule prohibiting subrogation by an insurer with an independent obligation to pay for medical expenses arising from an automobile accident fell within the scope of section 514(a). This law, which prevented plans from requiring reimbursement in the event of recovery from a third party, was held to "clearly" relate to the employee benefit plan. 886 F.2d at 185.

The state laws at issue in both *Shaw* and *Baxter* had the effect of dictating what benefits could or could not be provided under ERISA benefit plans. Each of the laws had an impact on primary administrative functions regulated by ERISA. The impact of the 3-to-1 rule is considerably different. That rule does not affect the type of benefits available to a participant, the means by which claims are processed, reviewed or paid, the applicable reporting and disclosure requirements, or any of the administrative practices governed by ERISA. The rule mandates a particular teacher-student ratio. One result is to limit the number of apprentices who can participate in the program. Another is to increase the opportunities each apprentice has to work with licensed pipefitters and

increase the oversight of each apprentice's work. To that extent, it does affect the form and amount of training received by each participant. These incidental effects are, however, no different than the effect of other traditional occupational licensing requirements. For example, Minnesota currently requires candidates for a journeyman's license to have had four years of pipefitting experience and to pass a test covering specified subject matter. Through these requirements, the state determines the length and the content of apprenticeship training. Despite this effect, these requirements are clearly not preempted by ERISA. Likewise, as plaintiffs concede, the state could prohibit anyone but a licensed pipefitter from performing high pressure pipefitting. This would have an even more drastic impact on plaintiffs' apprenticeship programs than the 3-to-1 rule. But again, despite the fact that it determines the "term" of an ERISA program, this rule would not be subject to ERISA's preemption provision.

The 3-to-1 rule is not preempted because it is a rule of general application concerning a subject traditionally reserved to the states which has no implications for ERISA's regulatory concerns and only an incidental effect on the administration of training programs. It in no way threatens the administrative integrity of employee benefit plans. The rule does not in any way conflict with Congress' purpose in enacting ERISA "to provide for a uniform source of law in the areas of vesting, funding, insurance and portability standards, for evaluating fiduciary conduct, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports." H.R.Rep.No. 533, 93d Cong. 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News. 4639, 4655;

S.Rep.No. 406, 93rd Cong. 2d Sess., *reprinted in*, 1974 U.S. Code Cong. & Admin. News 4838, 4871. The rule is an occupational training requirement enacted to protect public safety. Even with ERISA's broad preemption provision, we "must presume that Congress did not intend to preempt areas of traditional state regulation." *Metropolitan Life Insurance Co. v. Massachusetts*, 105 S.Ct. 2380, 2389 (1985). This presumption is bolstered here by the absence of any federal policy governing the training or supervision of high pressure pipefitters.

On the basis of the foregoing analysis, the Court concludes that Minnesota's 3-to-1 rule governing the use of apprentice pipefitters is not preempted by ERISA.

II. NLRA Preemption

Unlike ERISA, the NLRA contains no statutory preemption provision. Nevertheless, the Supreme Court has articulated two distinct bases for NLRA preemption of state laws. The first of these is known as the *Garmon* rule. The Court held in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) that the states may not regulate conduct that is actually or arguably regulated by sections 7 or 8 of the NLRA. The *Garmon* rule "protects the primary jurisdiction of the [National Labor Relations Board] to determine in the first instance what kind of conduct is either prohibited or protected by the NLRA." *Metropolitan Life*, 105 S.Ct. at 2394. The second NLRA preemption doctrine is called the *Machinists* rule based upon *International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427

U.S. 132 (1976). *Machinists* preemption prohibits state regulation of conduct associated with the bargaining process. That process was declared an area intended by Congress "to be controlled by the free play of economic forces." 427 U.S. at 140.

A. Garmon Preemption

Plaintiffs contend that the 3-to-1 rule is preempted because it requires non-union employers and employees to conform to a term of collective bargaining in violation of section 8's prohibition against unfair labor practices. Section 8 of the NLRA prohibits interference with the right to choose not to bargain collectively. 29 U.S.C. § 158(a).

Plaintiffs' argument is without merit. The 3-to-1 rule simply does not force plaintiffs to bargain with any labor organization. Under the rule, the employer plaintiffs may continue to hire only non-union workers to do pipefitting and the employee plaintiffs may continue to choose not to affiliate with a labor organization. Consequently, the Court holds that the 3-to-1 rule is not preempted by the *Garmon* rule.

B. Machinists Preemption

Plaintiffs argue that the 3-to-1 rule is preempted under the *Machinists* rule because, by requiring all contractors to abide by the union shop ratio, the rule is alleged to have substantially intruded on the collective bargaining process. Moreover, plaintiffs argue that the

rule gives an impermissible economic advantage to union contractors.

The case law does not support the plaintiffs' position. In *Metropolitan Life*, 105 S.Ct. 2380, the Supreme Court considered whether a state law mandating that minimum health care benefits be included in insurance policies was preempted under the *Machinists* rule. The Court held that "minimum state labor standards" were not preempted under *Machinists* because those standards "affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining process." 105 S.Ct. at 2397. Noting that the states have great latitude in protecting public health and safety and that state laws in those areas will inevitably intersect with the laws governing employers, employees and unions, the Court stated:

> Federal labor law in this sense is interstitial, supplementing state law where compatible, and supplanting it only when it prevents the accomplishment of the purposes of the federal Act.

105 S.Ct. at 2398.

In each of the cases where the *Machinists* preemption has been found, the preempted law had no justification apart from a desire to put pressure on a party to settle a labor dispute. In this case, the state adopted a minimum labor standard to address safety concerns stemming from the installation of high pressure piping and the training of apprentice pipefitters. While there is some suggestion in the record that the rule was also motivated by a desire to promote the interests of labor in the International Falls dispute, plaintiffs concede that the existence of a legitimate purpose for the rule makes the existence of other

potential motive irrelevant to their claim. The mere fact that the rule adopts a ratio identical to that contained in collective bargaining agreements does not compel the conclusion that the state has "undercut[] collective bargaining." *Fort Halifax*, 107 S.Ct. at 2222. The record demonstrates that the 3-to-1 rule is a minimum labor standard adopted to assure the adequate training and supervision of apprentices which is not inconsistent with the goals of the NLRA. Accordingly, the 3-to-1 rule is not preempted under the *Machinists* rule.

Finally, plaintiffs, informed of the Court's intention to grant defendant's motion for summary judgment and vacate the January 31, 1990 temporary restraining order, have moved to keep the TRO in effect pending appeal. The Court rejects that motion, but will in the interests of justice allow plaintiffs fourteen days from the date of this order to seek a stay pending appeal from the United States Court of Appeals for the Eighth Circuit.

Based on the foregoing, and upon the Court's independent de novo determination of the Magistrate's report, findings and recommendation, and the Court finding itself in agreement with the report and recommendation, and based upon the reasoning contained herein.

IT IS ORDERED that:

1. plaintiffs' objections to the March 30, 1990 report and recommendation are overruled;

2. the Court adopts the report and recommendation;

3. defendant's motion for summary judgment is granted;

4. plaintiffs' motions for preliminary and permanent injunctive relief are denied; and

5. the January 31, 1990 temporary restraining order is vacated effective fourteen days after the date of this order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

/s/ Harry H. MacLaughlin
Judge Harry H. MacLaughlin
United States District Court

DATED: April 27, 1990

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Boise Cascade Corporation, a Delaware corporation, BE&K Construction Company, a Delaware corporation, Charles L. Lee, Relco Unisystems Corporation, a Minnesota corporation, Forrest Dahmes, Mid-States Mechanical Services, Inc., a Minnesota corporation, and Kristine Southard,

Plaintiffs,

v.

Civ. No. 4-90-48

REPORT & RECOMMENDATION

Kenneth Peterson, Commissioner of the Minnesota Department of Labor and Industry, State of Minnesota,

Defendant,

and

Minnesota Mechanical Contractors Association,

Intervenor.

The above matter was before the undersigned United States Magistrate on March 13, 1990 for a hearing on defendant's motion for summary judgment. Plaintiffs Boise Cascade Corporation, BE&K Construction Company and Charles Lee were represented by David P. Pearson, Esq. and Lloyd W. Grooms, Esq. Plaintiffs Relco Unisystems Corporation, Forrest Dahmes, Mid-States

Mechanical Services, Inc., and Kristine Southard were represented by Lowell J. Noteboom, Esq. and Robert P. Thavis, Esq. Defendant was represented by Scott R. Strand, Esq. and William Howard, Esq. Intervenor was represented by Teresa Ayling, Esq. The instant report and recommendation is prepared pursuant to a referral from Judge MacLaughlin dated February 1, 1990.

I. PROCEDURAL POSTURE

The dispute in this matter concerns a new rule promulgated by the Minnesota Department of Labor and Industry (hereinafter "the Department") regarding the number of unlicensed apprentices who can perform high pressure pipefitting on a jobsite. Shortly before the rule was scheduled to take effect, plaintiffs filed the instant complaint seeking injunctive relief. Plaintiffs maintain that the rule is pre-empted by Employee Income Retirement Security Act (ERISA) and by the National Labor Relations Act (NLRA).[1]

On January 31, 1990, to preserve the status quo until the merits of plaintiffs' claims could be fully litigated, Judge MacLaughlin issued a temporary restraining order precluding the rule from being made effective with respect to the plaintiffs.[2]

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[1] In addition to the preemption claims addressed in this Report and Recommendation, the original complaint in this matter also claimed that the rule violated the minimum rationality requirements of substantive due process. This due process claim does not appear in the amended complaint, dated February 9, 1990.

[2] On February 16, 1990 defendants appealed Judge MacLaughlin's temporary restraining order to the Eighth Circuit

(Continued on following page)

On February 1, 1990 Judge MacLaughlin issued an order pursuant to 28 U.S.C. §636(b)(1)(B) referring plaintiffs' motion for a preliminary and a permanent injunction to the undersigned United States Magistrate for hearing and for the preparation of proposed findings of fact and recommendations for the disposition of the motion. Defendants contend that whether the rule is preempted by ERISA or the NLRA is purely a legal question and that there are no material issues of fact that need to be resoled [sic] before the court can rule on the preemption claims. Defendants, therefore, filed a motion for summary judgment. A hearing on defendant's motion was held on March 13, 1990.[3]

Rule 56(c), Fed. R. Civ. P. provides for the entry of summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also*

(Continued from previous page)

Court of Appeals. As of the date of this report and recommendation, the Eighth Circuit has not indicated whether it will treat the TRO as an appealable order or not. In any event, for the reasons set forth in *West Publishing Co. v. Mead Data Central, Inc.*, 799 F.2d 1219 (8th Cir. 1986), this court retains jurisdiction to decide the merits of the lawsuit despite the pendency of the appeal of the temporary restraining order.

[3] Minnesota Mechanical Contractors Association (MMCA) filed a motion to intervene in this matter, which was also heard on March 13, 1990. Pursuant to an order issued that same day, MMCA's motion to intervene under Rule 24(b), Fed. R. Civ. P. was granted by the undersigned.

Celotex Corp. v. Catrett, 477 U.S. 317 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The moving party bears the burden of demonstrating the absence of genuine issues of material fact. *Celotex*, 477 U.S. at 323; *City of Mt. Pleasant, Iowa v. Associated Elec. Co-op, Inc.*, 838 F.2d 268 (8th Cir. 1988). Once the moving party has established that no genuine dispute exists on any material fact, it is the responding party's burden to set forth affirmative evidence showing that there is a genuine dispute. *Anderson*, 477 U.S. at 255; *City of Mt. Pleasant*, 838 F.2d at 274. In determining a motion for summary judgment, the court must examine all of the evidence in a light most favorable to the non-moving party, and the non-moving party must be given the benefit of all reasonable inferences to be drawn from the underlying facts. *Anderson*, 477 U.S. at 255; *see also Suburban Newspapers of Greater St. Louis v. Kroger Co.*, 886 F.2d 1060, 1061 (8th Cir. 1989); *Krause v. Perryman*, 827 F.2d 346, 350 (8th Cir. 1987). At the hearing on the motion, plaintiffs conceded that if all of the facts set forth in their affidavit were deemed to be true, they could not articulate any factual dispute that would prevent the court from deciding the ERISA preemption issue as a matter of law. Likewise with respect to their NLRA claim plaintiffs could not articulate a factual dispute which would prevent the resolution of the legal question as to whether the rule was preempted, but said they wished to supplement the record with expert testimony.

For the purposes of the instant summary judgment motion, the undersigned has assumed all of the factual assertions in plaintiffs' affidavits to be true.

II. FINDINGS OF FACT

High pressure pipe fitting involves the installation of piping for gases, hot liquids, steam and ammonia systems. High pressure pipefitting has been regulated by the State of Minnesota since 1937. The Minnesota legislature has established a comprehensive scheme for the regulation of high pressure piping and has vested the department with primary responsibility for enforcement and supervision. (Affidavit of Lloyd Grooms, Ex. 6). The need for this regulation arose because of a concern that improperly installed piping could explode, causing injury to workers and to the public. The general regulatory scheme is directed toward this concern and concentrates on the examination and licensure of contractor and journeymen pipefitters, as well as the permitting and inspection of piping installed on jobsites. (Affidavit of Lloyd Grooms in Support of Plaintiffs' Motion for TRO, Ex. 6).

The State of Minnesota also regulates voluntary apprenticeship programs, which fall under the jurisdiction of the Voluntary Apprenticeship Division of the Department. These regulations exist concurrently with and parallel to the state's regulation of high pressure pipefitting. Under these regulations, an employer may choose to maintain a "Voluntary Apprenticeship Program" in order to train employees in various construction trades. The state does not require an employer to maintain such a program, but if the employer chooses to do so, that employer's program must comply with minimum training and supervision standards provided by the Department's rules. The employer must also register its apprentices with the Code Enforcement Division of the

Department so that the Department can track an apprentice's years of training and experience for licensure purposes. Most employers who maintain a Voluntary Apprenticeship Program for high pressure pipefitters are affiliated with labor unions and are signatories to collective bargaining agreements. (*See* Affidavit of Lloyd Grooms in Support of Plaintiffs' Motion for TRO, Ex. 6).

In 1984, the Department expanded its regulation of pipefitter programs to include those employers who were not affiliated with a union and had not signed collective bargaining agreements. The non-union apprenticeship programs are generally less formal than the Voluntary Apprenticeship Programs, and provide some classroom instruction by the employer combined with on-the-job experience. Apprentices participating in these programs are also registered with the Code Enforcement Division.

The non-union employers typically do not operate their programs using any specific ratio of licensed journeymen to apprentices while on the jobsite. (*See* Affidavits of W. Douglas Cross, Loren Corle and Kent Durenberger). The union employers who have the more formal Voluntary Apprenticeship Programs and who function under collective bargaining agreements operate their programs using a specific minimum ratio between licensed journeymen and unlicensed apprentices on the jobsite.

In August 1989, the Department published a Notice of Rulemaking on a rule which would mandate a minimum ratio of licensed journeymen to apprentices which could be on the jobsite. The proposed rule requires as follows:

> All persons learning the trade of pipefitting shall be under the direct supervision of a contracting or journeyman pipefitter. The minimum ratio of pipefitter trainees to licensed pipefitters on the jobsite shall be:
>
> a) One pipefitter trainee for the first licensed pipefitter; and
>
> b) One pipefitter trainee for every three licensed pipefitters after that; provided that at least one journeyman or contracting pipefitter must be on the jobsite at all times when work is in process.

Minn. R. 5230.0110, subp. 2a (hereinafter "the rule").

Plaintiffs in the instant case participated in the rule making procedure. Hearings were held on the rule in September and October of 1989. On December 11, 1989 Administrative Law Judge (ALJ) Allen E. Gilles [sic] issued a report recommending that the rule be adopted. In his report, the ALJ found that the Department was concerned that under the non-union programs, apprentices were being allowed on jobsites with little to no supervision from licensed journeymen pipefitters. The ALJ further found that the Department needed to rely upon the quality of the training of pipefitter apprentices to ensure that potentially explosive high pressure piping was correctly installed. The ALJ expressly found that:

> "the rule is needed at high pressure piping job sites in order to protect the integrity of the installed high pressure piping and to provide 'learning and assisting opportunities' for apprentices."

The ALJ further found that the rule "has been demonstrated to be both needed and reasonable." (*See* Affidavit of Lloyd Grooms in Support of Plaintiffs' Motion for TRO, Ex. 6).

Although the plaintiffs here did not raise their preemption claims before the ALJ, they specifically objected to the need and reasonableness of the rule. (*See* Affidavit of Robert Thavis). In making his finding, the ALJ specifically considered the objections made by the plaintiffs and recognized that the rule would realistically affect only the non-union contractors who had typically not used any particular ratio in the administration of their apprenticeship programs. The union contractors were already operating under a 3:1 ratio imposed by their collective bargaining agreements.

On December 12, 1989 Chief Administrative Law Judge William G. Brown issued a report approving the report of the ALJ in all respects. The rules were published in the Minnesota State Register on January 22, 1990, and were scheduled to be effective on February 1, 1990.

Plaintiff Boise Cascade Corporation's primary business is the manufacture of wood products and paper. In 1989 Boise undertook a $535 million expansion of its pulp and paper manufacturing facility in International Falls, Minnesota (hereinafter referred to as "the project"). A significant amount of high pressure piping is involved in the project. Plaintiff BE&K Construction Company, a non-union contractor, has been hired as Boise's general contractor on the Project. Plaintiffs Relco Unisystems Corporatio and Mid-States Mechanical Services are both non-union contractors who perform high pressure piping

work. Plaintiffs Charles L. Lee, Forest Dahmes and Kristine Southard are individuals employed by the plaintiff contractors.

Boise is a signatory to a labor agreement with the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 771 (hereinafter the "pipefitter's union"); this labor agreement provides for an apprenticeship training program for pipefitter apprentice employees.[4] (*See* Affidavit of Bob Anderson, Exhibit A). BE&K, Relco and Mid-States all offer, at their expense, training and education programs for apprentice pipefitters. None of these programs specify any ratio of journeymen to apprentice pipefitters to be present on the jobsite. (*See* Affidavits of W. Douglas Cross, Loren Corle and Kent Durenberger). All of the parties to the present suit agree that for the purposes of determining the instant summary judgment motion, these apprenticeship programs constitute employee welfare benefit plans as defined by the Employee Retirement Income Security Act (ERISA). 29 U.S.C. §1002(1).

Boise and the plaintiff contractors contend that the proposed mandatory 3:1 ratio required by the rule effectively, and improperly, dictates how their pipefitter apprenticeship programs should be administered. They

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[4] Boise's agreement with the pipefitter's union provides that a ratio of journeymen to apprentices is to be established through collective bargaining. As of the date of the filing of the complaint in the instant matter, no such ratio had been established through the bargaining process. (Affidavit of Bob Anderson).

have claimed that the imposition of this ratio will increase the cost of maintaining their apprenticeship programs by mandating that they hire more journeymen pipefitters, who require higher wages. Boise has asserted that the need to hire more journeymen pipefitters will increase the cost of completing the project. The plaintiff contractors have asserted that the increased costs will affect their ability to complete current contract work and will inhibit their ability to competitively bid for pipefitting work in the future.

Plaintiffs have additionally argued that the mandatory ratio would preclude many employee-apprentices from participating in their apprenticeship programs. Individual plaintiffs Lee, Dahmes and Southard have claimed that the imposition of the rules will likely cause them to lose their jobs, and, therefore, they will lose the ability to become licensed journeymen pipefitters. Plaintiff BE&K, a nationwide contractor, has argued that the mandatory ratio would subject its apprenticeship program to regulation which is not found in any other state.

III. CONCLUSIONS OF LAW

A. The Rule is Not Preempted by ERISA

Plaintiffs assert that the rule is preempted by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001, *et. seq.* Section 514(a) of ERISA (29 U.S.C. §1144(a)) contains an express pre-emption clause, which states as follows:

> [T]he provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or

> hereafter *relate to* any employee benefit plan described in Section 1003(b) of this title. . . .

[Emphasis added.] For the purposes of this motion defendants have conceded that the pipefitter apprenticeship programs maintained by the plaintiffs are employee welfare benefit plans as contemplated by ERISA. 29 U.S.C. § 1002(1).

The question before this court is whether the ratio rule "relates to" an employee benefit plan. If it does, then ERISA preempts the state rule and its enforcement must be enjoined. If the rule does not "relate to" an employee benefit plan, then ERISA does not preempt the rule and the plaintiffs' request for an injunction must be denied. As with every preemption claim, the purpose of Congress is the "ultimate touchstone." *Fort Halifax*, at 8; *citing Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985); *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)).

Plaintiffs argue that the rule at issue here "relates to" plaintiffs' employee benefit plans because of the impact the rule will have on their apprenticeship programs. Plaintiffs contend that existing Supreme Court precedent dictates the conclusion that the rule "relates to" their apprenticeship programs and that the rule is therefore preempted by ERISA.

Defendant on the other hand argues that the rule is a lawful exercise of the state's police powers to ensure adequate pipefitter training. The defendant contends that Congress could not have intended ERISA to preempt state occupational licensing standards, and that preemption of the rule would have a negative impact not only

upon the State's ability to regulate high pressure pipefitters, but would also hinder the state's power to regulate other trades and professions. Defendant argues that existing Supreme Court caselaw clearly dictates the conclusion that Congress did not intend that ERISA preempt the rule at issue here.

1. Supreme Court Precedent

Although the Supreme Court has provided some guidance as to what Congress meant by the phrase "relate to" in the ERISA preemption clause[5], there is no Supreme Court opinion which directly answers the question of whether the ratio rule adopted here relates to or does not relate to an employee benefit plan. Indeed, contrary to the contentions of the parties, the only thing which is clear from reviewing the relevant Supreme Court precedent, is that even the Justices of the Supreme Court cannot consistently agree on the scope of ERISA preemption. *See e.g., Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1 (1986) (5-4 decision finding state severance benefit law not preempted); *Mackey v. Lanier,* 486 U.S. 825 (1986) (4-3 decision finding state garnishment statute of general applicability not preempted by ERISA); *Metropolitan Life v. Massachusetts,* 471 U.S. 724 (1985) (8-0 decision finding state statute mandating minimum mental health care be provided under policies issued in Massachusetts is within the insurance savings clause of ERISA's preemption provision); *Shaw v. Delta Airlines,* 463 U.S. 85 (1983) (9-0

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[5] ERISA provides for several exceptions which will "save" a law from preemption even if the "relate to" standard has been met. None of these exceptions apply to the instant case.

decision finding state human rights law preempted by ERISA).

In *Shaw, supra,* the Court held that a law "relates to" an employee benefits plan "in the normal sense of the phrase, if it has a connection with or reference to such a plan." 463 U.S. at 96-97. The Court in *Shaw* found that Congress intended that the words "relate to" be used in their broad sense, and that the clause was meant to preempt more than just those state laws which were specifically designed to affect the subject matters covered by ERISA, such as reporting, disclosure, fiduciary responsibility and the like. *Id.* at 98. *See also Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 45-46 (1987) (reach of ERISA preemption is not limited to state laws specifically designed to affect employee benefit plans.)

In *Fort Halifax, supra,* the Court held that a Maine statute requiring employers to provide a severance payment to employees in the event of a plant closing was not preempted by ERISA. 482 U.S. at 1-2. The Court rejected the argument of the employer that any state law "pertaining to" a type of employee benefit listed in ERISA necessarily regulates an employee benefit plan, and therefore must be preempted. 482 U.S. at 7. In making its determination, the Court noted in *Fort Halifax* that the term "relate to" should be construed "expansively", and that, in accordance with Congressional intent, preemption was to apply when state law conflicts with the stated purpose of ERISA to prevent benefit plans from being subjected to differing jurisdictional patterns of regulation. *Id.* at 8 and 11. The Court found that the Maine severance statute did not require an employer to integrate a state-mandated benefit plan with an existing plan, or establish a separate

plan to provide and pay benefits. *Id.* at 14. Thus, because the statute required a one-time lump sum payment, there was no state-mandated plan to "administer" and the severance statute did not impede an employer's adoption of a uniform benefit scheme. *Id.*[6]

The Court in *Fort Halifax* expressly recognized that ERISA pre-emption analysis "must be guided by respect for the separate spheres of governmental authority preserved in our federalist system." 482 U.S. at 19, *citing Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981). In finding that the severance payment statute was not preempted, the Court stated:

> "If a State creates no prospect of conflict with a federal statute, there is no warrant for disabling

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[6] The Court recognizes that, unlike in the instant case, the employer in *Fort Halifax* had no "plan" to which the Maine severance statute could relate. That fact, however, does not undermine the rationale the Court used to reject the contention (apparently accepted by the *Fort Halifax* dissenters) that the state mandated benefit itself constituted a "plan." Because the Maine statute did not conflict with the ERISA policy of minimizing state interference with the administration of ERISA plans so that employers would not have to administer their plans differently in each state, the Court held the Maine statute was not preempted even though it would, as noted by the dissenters, have a substantial impact on employers who did have ERISA plans which provided for severance payments. 482 U.S. at 22. (White, J. dissenting). Moreover, the undersigned Magistrate agrees that *Fort Halifax* does not directly control the outcome of the case at bar. Nevertheless, the language of the opinion, particularly its emphasis upon whether there is a conflict between the state law being challenged and an ERISA policy, is instructive in determining whether the rule at issue here is or is not preempted by ERISA.

> it from attempting to address uniquely local social and economic problems."

482 U.S. at 19. *See also Metropolitan Life*, 471 U.S. at 740 (Congress did not intend to preempt areas of traditional state regulation.)

In *Mackey*, the Court was faced with a challenge to two Georgia statutes pertaining to the garnishment of plan benefits. The first law expressly provided that funds or benefits of ERISA plans could not be garnished. 486 U.S. at 825. In finding that this first law was preempted, the Court held that the possibility that the Georgia legislature enacted the law to help effectuate ERISA's underlying purpose did not save it from preemption. *Id*. at 829. In so finding, the *Mackey* Court recognized that: "The pre-emption provision . . . displace[s] all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements." 486 U.S. at 829, quoting *Metropolitan Life*, 471 U.S. at 739. The Court quoted the definition of "relate to" adopted in *Shaw, supra*, and emphasized that a law which has "reference to such a plan" relates to a plan. Because the Georgia statute expressly "referred" to, and indeed solely applied to ERISA plans, the Court held the law related to such plans and was preempted.

The *Mackey* Court has also faced with a pre-emption challenge to Georgia's general statutory garnishment scheme which, in the absence of the anti-garnishment statute which the Court found preempted, would permit the garnishment of ERISA plan benefits. Unlike the first statute, the general statute did not "single out or specially mention ERISA plans of any kind." 486 U.S. at 831. In

arguing for pre-emption, the petitioners in *Mackey* asserted that the general statute "related to" an ERISA plan because garnishment of an employee welfare plan would subject plan administrators to involvement in collection suits, and would cause the plans themselves to incur substantial administrative burdens and costs. *Id.*

Despite the substantial impact the garnishment procedures would have on plan administrators, the Supreme Court rejected the contention that ERISA benefits were exempt from garnishment by ERISA's preemption provision. The *Mackey* Court reviewed the language and structure of ERISA and concluded that "Congress did not intend to preclude state law attachment of ERISA welfare plan benefits." *Id.* at 838. In a footnote addressing the apparent incongruity of holding that a statute which permits garnishment of ERISA plan benefits escapes preemption while striking down an exception to the general garnishment statute, the Court expressly noted that it was the "singling out" of ERISA plans for special treatment which mandated the preemption of the anti-garnishment exception. *Id.* at 838, n.12.

2. Circuit Court Precedent

Some Courts of Appeals have also had occasion to address the question of when a state law "relates to" an employee benefit plan. Those opinions provide some additional guidance in deciding the instant case.[7]

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[7] Although several Eighth Circuit cases have addressed ERISA preemption none of them shed additional light on the

(Continued on following page)

The Second Circuit in *Rebaldo v. Cuomo*, 749 F.2d 133 (2nd Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985), held that ERISA did not preempt a New York state law which in effect prescribed the hospital rates charged to self-insured employee benefit plans. 749 F.2d at 134. In deciding whether a state law "relates to" an employee benefit plan, the *Rebaldo* court held that ERISA's preemption provision had to be read together with ERISA's definition of the term "State":

> The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefits plans covered by this subchapter.

(Continued from previous page)

issue of what Congress intended by the phrase "relates to" in the ERISA preemption provision. *See Baxter v. Lynn*, 886 F.2d 182 (8th Cir. 1989) (state law which conflicts with ERISA plan provision preempted by ERISA); *Rockney v. Blohorn*, 877 F.2d 637 (8th Cir. 1989) (ERISA does not preempt contract defenses); *In re Insurance Co. of North America*, 857 F.2d 1190 (8th Cir. 1988) (ERISA preempts statute prohibiting "vexatious refusal to pay" insurance benefits); *Anderson v. John Morrell & Co.*, 830 F.2d 872 (8th Cir. 1987) (state law action alleging employer breach of contract for failure to modify retirement plan preempted by ERISA); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.), *cert. denied* 454 U.S. 968 (1981) (ERISA preempts common law tortious interference with contract cause of action); *see also Minnesota Chamber of Commerce & Industry v. Hatch*, 672 F.Supp. 393 (D. Minn. 1987) (partially self-insured health benefit plan "relates to" ERISA plan).

29 U.S.C. § 1144(c)(2). The *Rebaldo* court then coupled the section 514(a) preemption provision with ERISA's definition of "state" to conclude that to be preempted a state law must not only "relate to" an employee benefit plan but must also "purport to regulate, . . . the terms and conditions of employee benefits plans". 749 F.2d at 137.[8] The *Rebaldo* court specifically recognized the broad and liberal construction of "relate to" as espoused by *Shaw*, but stated that "the preemptive scope of ERISA is neither all-encompassing, nor unlimited. ERISA does not invalidate those State statutes whose effect on pension plans is simply tangential in nature." 749 F.2d at 138, *citing Shaw*, 463 U.S. at 100, n. 21; *see also Lane v. Goren*, 743 F.2d 1337, 1339 (9th Cir. 1984); *Saving and Profit Sharing Fund of Sears Employees v. Gago*, 717 F.2d 1038, 1040 (7th Cir. 1983); *American Telephone & Telegraph Co. v. Merry*, 592 F.2d 118, 121 (2nd Cir. 1979). The court in *Rebaldo* further stated:

> A preemption provision designed to prevent state interference with federal control of ERISA plans does not require the creation of a fully

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[8] Although there is some dispute over whether the phrase "purports to regulate" modifies both "state" and "agency or instrumentality" for the reasons set forth by the *Rebaldo* Court, the undersigned is persuaded that the Second Circuit's reading of the statute is correct. *Rebaldo*, 749 F.2d at 137, n.1. The Ninth Circuit has adopted the same reading of the statute. *Martori Bros. v. James-Massengale*, 781 F.2d 1349, 1356 (9th Cir.), *amended*, 791 F.2d 799 (9th Cir.), *cert. denied*, 477 U.S. 107 (1986). *Accord, Local Union 598, Plumbers & Pipefitters Industry Journeymen & Apprentices Training Fund v. J.A. Jones Construction Co.*, 846 F.2d 1213 (9th Cir. 1988); *Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee*, 891 F.2d 719, 729 (9th Cir. 1989).

> insulated legal world that excludes these plans from regulation of any purely local transaction.

749 F.2d at 138.

Despite the fact that the statute at issue effectively increased the cost of operating benefit plans, the *Rebaldo* court rejected the claim that the statute was preempted:

> [I]f ERISA is held to invalidate every State action that may increase the cost of operating employee benefits plans, those plans will be permitted a charmed existence that never was contemplated by Congress. Where, as here, a State statute of general application does not affect the structure, the administration, or the type of benefits provided by an ERISA plan, the mere fact that the statute has some economic impact on the plan does not require that the statute be invalidated.

Id. at 138-39; *accord Howard v. Parisian*, 807 F.2d 1560, 1564 (11th Cir. 1987). *See also Massachusetts Nursing Ass'n v. Dukakis*, 726 F.2d 41, 44 (1st Cir. 1984).

The Second Circuit has recently expanded upon its interpretation of ERISA preemption in *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142 (2nd Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 57 (1989). In *Aetna*, the court compared various Supreme Court cases in which preemption had been found, *see e.g. Pilot Life, supra* (specific exemption of ERISA benefits); *Mackey, supra* (garnishment statute specifically referencing ERISA); *Shaw, supra* (prohibition of discrimination in pension benefits), with cases in which preemption was not found, *see e.g. Mackey, supra* (general garnishment statute); *Fort Halifax, supra* (one-time severance payment), and concluded that:

> [L]aws that have been ruled preempted are those that provide an alternative cause of action to employees to collect benefits protected by ERISA, refer specifically to ERISA plans and apply solely to them, or interfere with the calculation of benefits owed to an employee. Those that have not been preempted are laws of general application—often traditional exercises of state power or regulatory authority—whose effect on ERISA plans is incidental.

869 F.2d at 146; *accord General Electric Co. v. New York State Department of Labor*, 891 F.2d 25, 27 (2nd Cir. 1989). The *Aetna* court thus found that a Connecticut escheat law was one of general application, whose effect on ERISA benefits plans was too tenuous, remote, and peripheral to require preemption under section 514(a). *Id.* at 147. *See also Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550, 556 (6th Cir. 1987) (municipal ordinance requiring income tax of general application applies to employees without regard to their status as ERISA participants, ERISA preemption therefore not warranted); *Sommers Drug Stores v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1470 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987) (state common law of corporate fiduciary duty considered a law of general application whose connection with ERISA is too tenuous and remote to warrant preemption).

In *Martori Bros., supra*, the Ninth Circuit also recognized that while the scope of ERISA preemption is quite broad, it is not all-encompassing: "Some state actions may affect employee benefit plans in too tenuous, remote or peripheral a manner to warrant a finding that the law 'relates to' the plan." 781 F.2d at 1356, *citing Shaw*, 463 U.S. at 100, n. 21.

In holding that the state order at issue there was not preempted by ERISA, the *Martori* court further reviewed decisions from around the country and found that state laws that have been found to be preempted by ERISA fall into four categories: 1) laws that regulate the type of benefits or terms of ERISA plans; 2) laws that create reporting, disclosure funding, or vesting requirements for ERISA plans; 3) laws that provide rules for the calculation of the amount of benefits to be paid under ERISA plans; and 4) laws and common-law rules that provide remedies for misconduct growing out of the administration of the ERISA plan. 781 F.2d at 1357. (Citations omitted.) The *Martori* court thus concluded that:

> [T]he state law is preempted by section 514(a) if the conduct sought to be regulated by the state law is 'part of the administration of an employee benefit plan'; that is, the state law is preempted if it regulates the matters regulated by ERISA: disclosure, funding, reporting, vesting, and enforcement of benefit plans.

781 F.2d at 1357-58, *citing Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1505 (9th Cir. 1985).

Using these same standards, the Ninth Circuit has also found some actions to be preempted. For example, in *Local Union 598, supra,* the court found that a Washington statute requiring that "prevailing wages", including "usual benefits", to be paid to certain employees by public works contractors was preempted by ERISA because the statute both related to a plan *and* purported to regulate it. *Local Union 598,* 846 F.2d at 1218-19. The Ninth Circuit also concluded in *Hydrostorage, supra,* that a state administrative order requiring contractors working on

public works projects to participate in and contribute to an apprenticeship program both "related to" and purported to regulate an ERISA plan. 891 F.2d 729-30.[9]

3. ERISA Preemption is a Question of Degree

From the foregoing, the undersigned Magistrate concludes that whether a state law is preempted by ERISA appears to be a question of degree. On the one hand there are cases where the state law is clearly preempted. For example, where a state law expressly refers to ERISA or employee benefit plans, even if not in conflict with the federal scheme, the state law is preempted. *See, e.g. Mackey,* 486 U.S. at 829 (Georgia law specifically exempting ERISA plans from garnishment). Additionally, a state law will be preempted where the federal remedy provided is exclusive, even if the state remedy does not conflict with the federal remedy. *See, e.g. Dependahl,* 653 F.2d at 1215-16 (Missouri common law remedy for tortious interference with employee benefit plan administration). Likewise, state laws which conflict with a federal

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[9] In *Hydrostorage,* a case relied upon heavily by the plaintiffs in the instant case, the state order at issue expressly required Hydrostorage to become bound to the terms of an ERISA apprenticeship plan. 891 F.2d at 730. In the instant case, unlike in *Hydrostorage,* the rule does not require employers to have an ERISA plan or to comply with anyone else's ERISA plan. The rule here simply establishes a minimum ratio which is equally applicable to all employers whether they have a plan or not. Likewise in *Local 598,* unlike in the instant case, the Ninth Circuit expressly found that the prevailing wage statute at issue there created funding requirements for ERISA plans. 846 F.2d at 1218. Here unlike in *Local 598* the rule does not create any funding requirement.

policy expressed in ERISA, but which do not expressly refer to employee benefit plans are also clearly preempted. *See, e.g. Shaw,* 463 U.S. at 108-90 (New York law prohibiting discrimination in employee benefit plans on the basis of pregnancy); *Metropolitan Life,* 471 U.S. at 739-40 (Massachusetts law requiring employers to purchase specified mental health benefits).

On the other hand, there are cases where the state law is just as clearly not preempted. For example, where the relationship between the state law and ERISA is too tenuous, remote or peripheral to warrant a finding that the law "relates to" the plan, the state law is not preempted. *See Shaw,* 463 U.S. at 100, n.21. Likewise, where a state law addresses uniquely local social and economic problems, and creates no prospect of conflict with a federal statute, the state law will not be preempted. *See Fort Halifax,* 482 U.S. at 19; *Metropolitan Life,* 471 U.S. at 740.

To determine where in this progression the rule at issue here falls, the undersigned concludes that the following factors must be considered:

1. Whether the rule expressly refers to an ERISA plan or singles out ERISA plans for special treatment;

2. Whether the connection between the rule and the plan is too tenuous, remote or peripheral to warrant preemption;

3. Whether the rule is directed towards a local concern in an area traditionally regulated by the state;

4. Whether the rule conflicts with an ERISA policy by purporting to regulate either directly or indirectly the terms and conditions of welfare

benefit plans or by creating reporting, disclosure, funding or vesting requirements for ERISA plans; and

5. Whether preemption would insulate plaintiffs' plans from local regulation thereby permitting them a "charmed existence" never contemplated by Congress.

Applying the foregoing factors to the instant case, the undersigned concludes that the rule at issue here is not preempted by ERISA.

The rule does not expressly reference or single out ERISA plans for any special treatment. The rule applies equally to all employers whether they have ERISA plans or not, and simply provides that a minimum three to one ratio of journeymen to apprentices may work on any given high pressure pipefitting job. Employers who have apprenticeship programs will, of course be affected by the rule. Employers who do not have apprenticeship programs, however, will be equally affected by the rule, as will the apprentice pipefitters who are not affiliated with any particular employer's apprenticeship training program.[10]

Although the rule will have some impact upon employee benefit plans, the impact appears to be a classic example of one which is too tenuous, remote or peripheral to warrant preemption. Like the economic impact of the increased operating costs discussed in *Rebaldo* or the

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[10] Plaintiffs' contention that the rule is specifically directed at employee benefit plans and, like the antigarnishment statute in *Mackey*, is not a law of general application is without merit.

administrative burdens recognized in *Mackey*, the impact on plaintiffs' plans here simply does not mandate the conclusion that the rule of general applicability "relates to" plaintiffs' plans.

The stated purpose of the rule, as indicated in the administrative record, is to ensure "higher quality training" for high pressure pipefitter apprentices to protect the integrity of installed high pressure piping. Such a purpose is clearly one directed towards a "local concern" in an area traditionally regulated by the state. Like the plant closing severance benefit at issue in *Fort Halifax*, and the state prescribed hospital rates in *Rebaldo*, the rule here is a legitimate exercise of the state's police powers in an area traditionally regulated by the state.

The rule does not conflict with any ERISA policy. There is nothing in the rule which creates any reporting, disclosure, funding or vesting requirements for ERISA plans, nor does the rule purport to regulate either directly or indirectly the terms or conditions of plaintiffs' benefit plans. Although the rule will surely have an impact on the plans as described in plaintiffs' affidavits, there is nothing in the rule which purports to regulate plaintiffs' plans and the impact on the plans is simply an incidental consequence of the rule.

Finally, because there is no federal ERISA policy regulating the level of training to be given high pressure pipefitters, preemption of the rule would create a regulatory black hole, insulating plaintiff's apprenticeship programs from local regulation. Such programs would thereby be permitted a "charmed existence" never contemplated by Congress.

4. Plaintiffs' Specific Contentions

Plaintiffs have set forth in their memoranda and in their affidavits several different ways the rule will impact upon their apprenticeship training programs. Plaintiffs contend that every state rule which impacts upon an employee benefit plan must relate to it, unless the impact is "too tenuous, remote, or peripheral" to warrant ERISA preemption.

The plaintiff contractors here contend that the rules impact upon their ability to administer their pipefitter apprenticeship programs in that they mandate how many apprentices may participate in the on-the-job training portions of their programs. The contractors plaintiffs further contend that the rule will prohibit an employer from having an unlimited number of untrained apprentices doing high pressure pipefitting, as they would be permitted to do in the absence of the rule. This, in turn, will affect how may individuals are eligible to participate in their apprenticeship programs. Plaintiffs Lee, Dahmes and Southard may well lose their jobs as a result of cutbacks in the number of eligible apprenticeship program participants.

Plaintiff contractors further claim that the rule impacts upon the cost of maintaining their apprenticeship programs by requiring that they hire more, higher paid, journeymen pipefitters. The plaintiff contractors have asserted that as a result of these increased costs, their ability to complete current contract work will be affected, as will their ability to competitively bid for pipefitting work in the future.

Boise has asserted that the rule impacts upon the Project in that the hiring of more journeymen pipefitters will increase the cost of completing the Project.

Assuming all of these facts to be true, the rule undoubtedly will have an impcat upon pipefitter apprenticeship programs. But contrary to the plaintiffs' contention that the rule regulates the terms of apprenticeship training programs, the foregoing impacts are simply incidental consequences of the rule. Not every action which impacts upon a plan "relates to" a plan. *See, e.g. Aetna,* 869 F.2d at 147 (state escheat law affects ERISA plans in tenuous and remote manner); *Rebaldo,* 749 F.2d at 138 (increase in cost of maintaining self insurance plans by reason of state law does not mandate preemption where law is of general application and does not affect structure, administration or type of benefits provided); *Martori,* 781 F.2d at 1359 ("make whole" award requiring payment of proportionate fringe benefits impacts upon employee benefit plans but relates to said plans in a tenuous and remote manner such that preemption is not warranted).

Plaintiffs also argue that the rule impacts upon their apprenticeship plans in that it would subject their apprenticeship programs to regulation which is not found in any other state. But that impact is conceptually no different than the impact of the pipefitter registration and licensing requirements, currently in place, that plaintiffs expressly do not challenge. Indeed, counsel for plaintiff Boise Cascade conceded at the hearing that a regulation which prohibited *any* unlicensed pipefitter from working

on a job would not be preempted.[11] Although the economic impact of the rule on plaintiffs is greater than the current registration and licensing requirements, for the purposes of ERISA preemption the rule is conceptually no different that the rules plaintiffs do not challenge. As not every state requires the licensing of pipefitters, the current Minnesota rule requiring licensing, which is not being challenged, imposes different requirements on plaintiffs' apprenticeship programs in Minnesota than they are required to meet in states with no licensing requirements.

Finally, plaintiffs' claim that the rule conflicts with ERISA's exclusive remedy provision is without merit. There is nothing in the rule which limits the right of any participant to enforce his or her rights under ERISA. If any of the individual plaintiffs suffer any injury or loss for which ERISA provides a remedy, he or she may file a lawsuit under ERISA to enforce his or her rights.

In short, the impact of the rule on plaintiffs' apprenticeship programs does not compel the conclusion that the rule relates to the plans within the meaning of ERISA. The undersigned therefore concludes that Congress did not intend by section 514(a) to preempt traditional state regulation of pipefitting, and further concludes that the

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[11] Counsel for plaintiffs Relco Unisystems Corporation, Forrest Dahmes, Mid-States Mechanical Services, Inc., and Kristine Southard refused to concede that such a regulation would not be preempted, stating only that his clients were not challenging the current registration and licensing requirements.

rule does not relate to an employee benefit plan within the meaning of section 514(a).

B. The Rule is not Preempted by the National Labor Relations Act

Plaintiffs contend that even if the rule is not preempted by ERISA, it is preempted by the National Labor Relations Act (NLRA), 29 U.S.C. § 151, *et. seq.* Plaintiffs argue that in establishing the ratio rules, the Department has "deliberately and purposefully" adopted the ratio contained in collective bargaining agreements between the pipefitters union and union signatory contractors, and has thereby impermissibly intruded into the plaintiffs' right, guaranteed under the NLRA, to collectively bargain or not as they see fit.

Defendant contends that in enacting the NLRA, Congress did not intend to displace the States' authority to substantively regulate minimum employment conditions. Defendant further contends that such state regulations may properly form a "backdrop" for collective bargaining negotiations. Defendant believes that the mandatory minimum ratio rule constitutes the kind of regulation which merely provides a backdrop against which negotiations can occur.

The NLRA, unlike ERISA, does not have an express preemption provision. The Supreme Court has implied preemption of state laws by the NLRA in two circumstances where it has found Congress intended the Act to supercede local laws. Where the preemptive effect of federal enactments is not explicit, "courts sustain a local regulation 'unless it conflicts with federal law or would

frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States.' " *Metropolitan Life*, 471 U.S. at 747-48, *citing Allis Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985), quoting *Malone*, 435 U.S. at 504.

The United States Supreme Court has articulated two types of implied NLRA preemption: *Garmon* preemption, based upon the Court's ruling in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) and *Machinists* preemption, based upon the Court's ruling in *Lodge 76, Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976).

1. Garmon Preemption

Garmon preemption deals with the express provisions of Sections 7 and 8 of the NLRA. Section 7, codified at 29 U.S.C. § 157, protects the right of employees to join, form, or assist labor organizations and to bargain collectively through such organizations. Section 8, codified at 29 U.S.C. § 158, prohibits employers and unions from engaging in certain unfair labor practices. The Court in *Garmon* held that "when it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 . . . or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield." 359 U.S. at 244.

Plaintiffs Relco, Mid-States, Dahmes and Southard argue that the mandatory minimum ratio rule here falls within the scope of *Garmon* preemption because it represents an invalid attempt to require non-union employers

and employees to conform to a collective bargaining agreement in violation of Section 8 of the NLRA. Section 8 prohibits unfair labor practices including interference with the right to choose *not* to collectively bargain, or refusal to collectively bargain when requested to do so. 29 U.S.C. § 158(a).

The undersigned finds this argument to be without merit. There is nothing in the rule which forces plaintiffs to collectively bargain with any labor organization. Although the ratio incorporated into the rule is one that is found in collective bargaining agreements, the imposition of the ratio does not require plaintiffs to recognize any particular labor organization or to collectively bargain with anyone. Under the rule, provided plaintiffs maintain the required ratio, they may continue to hire only non-union members to do pipefitting. The rule does not conflict with Section 8 of the NLRA.

Plaintiffs have also argued that *Garmon* preemption applies because the rule would effectively and impermissibly force individual plaintiffs Lee, Dahmes and Southard to forego their choice not to be affiliated with a union in order that they may obtain employment with a union contractor. They assert that they will be forced to join a union because the non-union contractors will be forced to reduce their apprenticeship programs as a result of the rules. The undersigned finds this argument likewise to be without merit. The mandatory minimum rule neither eliminates the apprenticeship programs of the non-union contractors, nor takes away any rights of the individual plaintiffs to choose to become, or not to become, a union member. Consequently, the undersigned concludes that the rule is not preempted by the NLRA under the *Garmon* doctrine.

2. Machinists Preemption

The rule is also not preempted by the NLRA under the *Machinists* formulation. Unlike *Garmon, Machinists* preemption is not based upon the terms of the NLRA. The Court found that Congress intended to allow certain conduct to be "controlled by the free play of economic forces." *Id.* at 140, *quoting NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971). Thus, the Court concluded that neither the federal government through the NLRA nor any state law may regulate or intrude upon the "economic devices of labor and management" used in the collective bargaining process. 427 U.S. at 149. The *Machinists* court held that the NLRA preempts the authority of a state labor relations board to enjoin a union and its members from continuing to refuse to work overtime pursuant to a union policy to put economic pressure on the employer in ongoing negotiations over the renewal of a collective bargaining agreement. 427 U.S. at 133.

In *Metropolitan Life,* the Supreme Court held that a state law mandating that minimum health care benefits be included in insurance policies issued to residents of the states was not preempted by the NLRA. The appellants in *Metropolitan Life* argued that the law impermissibly intruded into collective bargaining negotiations, and effectively mandated the terms of collective bargaining agreements. The Court expressly rejected the contention that because such benefits were typically negotiated through collective bargaining, that the NLRA preempted the state's mandated benefit law. 471 U.S. at 748. *Id.*

In deciding the issue in *Metropolitan Life,* the Court found that the NLRA is "concerned primarily with establishing an equitable process for determining terms and

conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions." 471 U.S. at 753, *citing* Cox, "Recent Developments in Federal Labor Law Preemption", 41 *Ohio St. L.J.* 277, 297 (1980). The Court concluded that the "evil" Congress was attempting to address in the NLRA was

> "entirely unrelated to local or federal regulation establishing minimum terms of employment. . . . No incompatibility exists . . . between federal rules designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA."

471 U.S.at 754-55. The Court therefore found that minimum state labor standards were independent of the collective bargaining process and applied equally to unionized and non-unionized workers. *Id.* at 755.

In concluding that the mandated benefits law at issue in *Metropolitan Life* was not subject to *Machinists* preemption, the Court found that "[t]he States traditionally have had great latitude under their police powers to legislate as 'to the protection of the lives, limbs, health, comfort, and quiet of all persons.' " 471 U.S. at 756, *citing Slaughter-House Casses*, 16 Wall. 36, 62 (1873), quoting *Thorpe v. Rutland & Burlington R. Co.*, 27 Vt. 140, 149 (1885). Therefore, "[s]tates possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum

and other wage laws, laws affecting occupational health and safety . . . are only a few examples." 471 U.S. at 756 (citations omitted).

The Court in *Fort Halifax* reiterated the holding of *Metropolitan Life*, and added that NLRA preemption should not be "lightly inferred . . . , since the establishment of labor standards falls within the traditional police power of the State." 482 U.S. at 20. The Court concluded that a state law imposing upon employers the obligation to make a minimum severance benefit payment to factory workers in the event of a factory closing was not preempted by the NLRA. *Id.* at 23. In so holding, the Court stated:

> "[T]he mere fact that a state statute pertains to matters over which the parties are free to bargain cannot support a claim of preemption, for 'there is nothing in the NLRA . . . which expressly forecloses all state regulatory power with respect to those issues . . . that may be subject of collective bargaining.' "

Id. at 22, quoting *Malone*, 435 U.S. at 504-505.

Defendant here argues that the mandatory minimum ratio at issue here, like the laws at issue in *Metropolitan Life* and *Fort Halifax*, are simply minimum labor requirements. Plaintiffs argue that the ratio requirement is typically a term over which parties have collectively bargained, and does not fall within the scope of permissible state regulation of minimal labor standards permitted by the NLRA.

Plaintiffs' reliance on *Bechtel Construction v. United Brotherhood of Carpenters*, 812 F.2d 1220 (9th Cir. 1987), and

Hydrostorage, Inc. v. Northern California Boilermakers, 685 F.Supp. 718 (N.D. Ca. 1988), *aff'd* 891 F.2d 719 (9th Cir. 1989), is misplaced.

In *Bechtel*, the court held that California's apprentice wage standards were not a legal minimum wage but was a standard which could be under-cut, pursuant to the state law itself by a collective bargaining agreement. 812 F.2d at 1222. In determining that this law did not represent a "minimum labor standard" as contemplated by *Metropolitan Life*, the court found that the apprentice wage standard could not be a "minimum legal requirement" because the law permitted lower rates to be negotiated. Because the apprentice wage standard was not a minimum wage dictated by state law, the Ninth Circuit held that the NLRA preempted any state action to enforce the apprentice wage standard instead of the collectively bargained for lower wage. The Ninth Circuit recognized that if the apprentice wage standard *was* a minimum wage, then under the Supreme Court's opinion in *Metropolitan Life*, it would not be preempted by the NLRA. The rule here, unlike the apprentice wage standard in *Bechtel*, is not negotiable. There is no room for adjustment by collective bargaining or otherwise of the 3:1 ratio. The rule applies equally to all employers whether they have a collective bargaining agreement or not. Plaintiffs argue that the rule does not fall equally upon union and non-union employers because, as the ALJ recognized in his report, the unions already have the mandatory minimum ratio in place as a result of their collective bargaining agreements. Therefore, plaintiffs contend that the rule has no effect on those union contractors. The fact that the rule will have no practical effect on union contractors flows

not from the rule, but from the fact that they have agreed to the necessity of the ratio through their collective bargaining process. *See Fort Halifax*, 482 U.S. at 22, n. 15. As the rule at issue here is a minimum standard applicable to all employers, *Metropolitan Life* compels the conclusion that it is not preempted by the NLRA.

In *Hydrostorage*, the District Court found that the order of the state agency at issue there would require the plaintiff to execute an "Agreement to Train Apprentices". Under the terms of that agreement, plaintiff would be forced to agree to bind itself to certain of the terms of a specifically identified collective bargaining agreement and to any future changes that may be negotiated by the union and employer parties. *Id.* at 724. The District Court held that, because the order required the plaintiff to become a party to certain provisions of the collective bargaining agreement, the order was preempted by the NLRA.[12] *Id.* at 725.

The mandatory minimum ratio rule here, unlike the rule at issue in *Hydrostorage*, does not bind the plaintiffs to the terms of any collective bargaining agreement. That the minimum ratio requirement adopted by the state, whether by design or otherwise, is identified to the ratio in some collective bargaining agreements does not compel the conclusion that the state has intruded into the area of collective bargaining from which the NLRA excludes it.

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[12] Because the Court of Appeals agreed with the District Court that the order at issue in *Hydrostorage* was preempted by ERISA, the Ninth Circuit did not address the NLRA preemption claim. *Hydrostorage*, 891 F.2d at 732.

There is no evidence to suggest that the state in any way sought to interfere with the collective bargaining process. The issue is not, as plaintiffs have suggested, whether a particular term has traditionally been left to collective bargaining, but whether Congress intended that the particular term be left to the "free play of economic forces."[13] There is nothing in the NLRA, its legislative history, or the cases cited by plaintiffs to suggest that Congress intended by NLRA to preempt the power of the state to adopt rules it finds to be needed to protect the integrity of installed high pressure piping and to provide higher quality training for high pressure pipefitter apprentices.

Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 614-15 (1986), also does not support the plaintiffs' NLRA preemption claim. In *Golden State*, a taxicab company applied to the city for renewal of its operating franchise; while the renewal application was pending, the company's labor contract with its drivers expired and the drivers went on strike. *Id.* at 609-10. In discussing whether or not to grant the renewal, the labor dispute was central to the city council's discussion, and the sympathy of the council members was with the union. *Id.* at

---

[13] For this reason, the undersigned rejects plaintiffs' contention that there exists a genuine issue of fact which must be decided before the court can decide the NLRA preemption issue. Even assuming arguendo that the journeyman to apprentice ratio is a matter that has historically been a term of collective bargaining, whether Congress intended that the term be "left to the free flow of economic forces" thereby preempting the power of the state to regulate it, is a legal question of Congressional intent, and not an issue of fact.

611. The council informed the parties that the renewal would be rejected unless the strike was settled "by the end of the week"; when the strike did not settle, the council decided not to renew the franchise. *Id.* In determining whether the city's actions were preempted by the NLRA, the Court found that the parties' resort to economic pressure was a "legitimate part of their collective bargaining process." 475 U.S. at 615, *citing Machinists*, 427 U.S. at 144. The Court further found that the bargaining process was thwarted when the city, in effect, "imposed a positive durational limit on the exercise of economic self-help", and that the city therefore "entered into the substantive aspects of the bargaining process to an extent Congress has not countenanced." 475 U.S. at 615-16, *citing NLRB v. Insurance Agents*, 361 U.S. 477, 498 (1960).

In the instant case, unlike in *Golden State*, there is nothing in the record to suggest that the state has entered into the substantive aspects of the bargaining process. Although the rule will have the practical effect of dictating a term of the collective bargaining agreement that the union and Boise Cascade expressly agreed to negotiate at a later date, unlike in *Golden State*, there is no evidence that the state, by the rule sought to influence the outcome of that particular bargaining process. Unlike the state action in *Golden State*, which had no independent justification other than to artificially compel a particular employer to settle a labor dispute with striking employees, the rule at issue here, as more fully discussed by the ALJ, addresses a specific problem requiring regulatory attention and has only the incidental effect of influencing the outcome of the future negotiations the union and Boise Cascade agreed to hold.

The undersigned concludes that the mandatory minimum ratio rule is not preempted by the NLRA.

IV. RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY RECOMMENDED that:

1. Defendant's motion for summary judgment be GRANTED;

2. Plaintiffs' motions for preliminary and permanent injunctions be DENIED.

DATED: MARCH 30 , 1990

/s/ Franklin L. Noel
FRANKLIN L. NOEL
United States Magistrate

Pursuant to Local Rule 16C(2), any party may object to this report and recommendation by filing with the Clerk of Court and serving all parties, within ten days, a writing which specifically identifies those portions of this report to which objection is made and the legal and factual basis for that objection. All memoranda and other documents to be submitted in support of this report must be filed within seven days of the making of any objection. Failure to comply with this provision shall operate as a forfeiture of the objecting party's right to seek review in the Court of Appeals.

APPENDIX D

Employee Retirement Income Security Act (ERISA), § 514, 29 U.S.C. § 1144

(a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan . . . .

. . .

(d) Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law.

Employee Retirement Income Security Act (ERISA), § 3, 29 U.S.C. § 1002

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than

pensions on retirement or death, and insurance to provide such pensions).

. . .

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

National Apprenticeship Act of 1937 (Fitzgerald Act), 29 U.S.C. § 50

The Secretary of Labor is hereby authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship . . . .

U.S. Department of Labor Apprenticeship Rules, 29 C.F.R. pt. 29.

§ 29.5 Standards of apprenticeship.

An apprenticeship program, to be eligible for registration/approval by a registration/approval agency, shall conform to the following standards:

. . .

(b) The program standards contain . . . provisions concerning the following:

. . .

(7) The numeric ratio of apprentices to journeymen consistent with proper supervision, training, safety, and continuity of employment, and applicable provisions in collective bargaining agreements, except where such ratios are expressly prohibited by the collective bargaining agreements. The ratio language shall be specific and clear as to application in terms of jobsite, work force, department, or plant.

Minnesota High-Pressure Pipefitting Licensing Law, Minn. Stat. § 326.48, subd. 1 (1990)

No person, firm, or corporation shall engage in or work at the business of a contracting pipefitter or journeyman pipefitter unless licensed to do so by the department of labor and industry. No license shall be required for repairs on existing installations. A contracting pipefitter may also work as a journeyman pipefitter.

. . .

The department of labor and industry shall prescribe rules, not inconsistent herewith, for the examination and licensing of pipefitters and for issuance of permits for the installation of high pressure piping.

Minnesota Department of Labor and Industry High-Pressure Pipefitting Licensing Rules, Minn. Rules pt. 5230.0040-.0110 (1991)

5230.0050 LICENSING AND REGISTRATION REQUIREMENT

No person, firm, corporation, or association shall engage in the business or work at the

occupation of high pressure piping in the state of Minnesota without first obtaining a license and being registered as a contracting or journeyman pipefitter, as the case may be, and no licensed contractor shall employ a journeyman pipefitter, to install high pressure piping unless such journeyman is a licensed pipefitter, and no person shall work as a pipefitter trainee for more than 30 days without being registered as such, nor longer than four years without making application for examination and license as a pipefitter.

5230.0110 REGISTRATION OF TRAINEES

Subp. 2a. All contracting pipefitters shall, within ten days of the employment of a pipefitter trainee, inform the department of the employment of the pipefitter trainee, giving the name, address, age, and date of employment of the pipefitter trainee.

All persons learning the trade of pipefitting shall register with the department on an annual basis until the four years of training are documented. The registration shall be made at the time of initial registration with the department and annually after that on the anniversary of the initial registration. Upon completion and verification of four years of employment and training by a licensed contracting pipefitter, the pipefitter trainee shall make application for examination and license as a journeyman.

All persons learning the trade of pipefitting shall be under the direct supervision of a contracting or journeyman pipefitter. The minimum ratio of pipefitter trainees to licensed pipefitters on the jobsite shall be:

A. one pipefitter trainee for the first licensed pipefitter; and

B. one pipefitter trainee for every three licensed pipefitters after that; provided, that at least one journeyman or contracting pipefitter must be on the jobsite at all times when work is in progress.

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(2)

No. 91-707

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

JOHN B. LENNES, JR., COMMISSIONER OF THE DEPARTMENT OF LABOR AND INDUSTRY, STATE OF MINNESOTA,

and

MINNESOTA MECHANICAL CONTRACTORS ASSOCIATION, INC.,

Petitioners,

v.

BOISE CASCADE CORPORATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE MECHANICAL CONTRACTORS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

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and

MINNESOTA MECHANICAL CONTRACTORS ASSOCIATION, INC.,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF MECHANICAL CONTRACTORS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

INTRODUCTION

The Mechanical Contractors Association of America ("MCAA") seeks leave to file a Brief Amicus Curiae in support of the Petition for a Writ of Certiorari in this proceeding.

MCAA has sought consent to file its brief from the parties in this case. The Petitioners, John B. Lennes,

Jr., Commissioner of the Department of Labor and Industry, State of Minnesota, and the Minnesota Mechanical Contractors Association, Inc. have given their consent. The Respondents, Boise Cascade Corporation, BE&K Construction Company, Charles L. Lee, Relco Unisystems Corporation, Forrest Dahmes, Mid-States Mechanical Services, Inc., and Kristine Southard have not given consent.

MCAA supports the position of the Petitioners in this proceeding and asks that the Court grant certiorari and reverse the decision of the Eighth Circuit.

MCAA'S INTEREST AS AMICUS

MCAA is a membership association comprised of more than 1,300 mechanical contracting firms operating throughout the United States. Its activities include providing top-level training programs for inexperienced workers, in order to assure safety in the construction industry. MCAA is also a joint sponsor, with labor organizations, of apprenticeship programs throughout the country. Its intensive programs combine classroom training with on-the-job training.

MCAA has long been active in promoting job site safety. Many years prior to the enactment of the Occupational Safety and Health Act (OSHA), 29 U.S.C. § 651 *et seq.*, MCAA established a safety committee which now provides its contractor members with current information on safety programs and regulations and on other programs to promote job-site safety.

Many construction-related businesses in this country are not affiliated with MCAA and do not follow its rigorous safety standards. The actions of some contractors in ignoring or minimizing work place safety have lead to the enactment of federal and state regulations imposing minimum safety requirements for the workplace. These

safety regulations are essential to prevent disastrous accidents that occur all too frequently.*

The Minnesota regulation involved in this case, which established job-site ratios between unlicensed and licensed high pressure pipefitters, is an example of such safety measures. The regulation seeks to maintain a sufficient number of trained and licensed pipefitters at job sites for adequate supervision and safety. Without such a requirement, employers would be free to use untrained, unlicensed, and unsupervised employees to perform extremely hazardous high pressure pipefitting work. Congress certainly did not contemplate that the preemption provision of the Employee Income Retirement and Security Act (ERISA), 29 U.S.C. § 1114, would erode the ability of Minnesota or other states to enact measures directed to workplace safety.

MCAA seeks to file a Brief Amicus Curiae in this matter because it believes that the decision of the Eighth Circuit would have a significant adverse effect on workplace safety. As a joint sponsor and participant in apprenticeship programs throughout the country, MCAA is in a position to furnish the Court material information about the effect of the Minnesota regulation on apprenticeship programs and job-site safety.

---

* A contemporary illustration of the high degree of hazard created by industrial accidents occurred in Hamlet, North Carolina, in September, 1991. A fire at a chicken processing plant took the lives of 25 people and injured more than 40 others, as well as caused substantial property damage.

CONCLUSION

For the foregoing reasons, MCAA respectfully requests the Court to grant leave for it to file a Brief Amicus Curiae in this proceeding.

Respectfully submitted,

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November 27, 1991

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IN THE

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF AMICUS CURIAE MECHANICAL CONTRACTORS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

SUMMARY OF ARGUMENT

The Mechanical Contractors Association of America ("MCAA") supports the position of the Petitioners herein. MCAA respectfully submits this Amicus Brief and requests that the Court grant certiorari and reverse the ruling of the Eighth Circuit Court of Appeals.

The decision of the Court of Appeals, if allowed to stand, may severely impede the efforts of the states to assure safety in construction work. In this particular case, the court's decision precludes Minnesota's requirement that a sufficient number of fully trained, experienced, and licensed workers be present at a job site, and the decision threatens more broadly to impair state-imposed safety requirements. MCAA, in furtherance of its interests in promoting and protecting construction safety, asks that the Court grant certiorari, re-examine the decision of the Court of Appeals, and reverse the ruling below.

MCAA is particularly concerned that the decision of the Court of Appeals will preclude or substantially limit state regulation of the licensing of persons engaged in the construction trades, without compensating federal regulation. The prohibition of this type of safety regulation, and other regulations like it, inevitably will lead to injury, death, and destruction of property from construction accidents. In addition, the decision of the Court of Appeals permits an intrusion on interests traditionally and prudently left to state regulation, contrary to principles of federalism that this Court has established and despite the absence of any Congressional intent, express or implied, to preempt state safety regulations.

ARGUMENT

I. THE INTERESTS AND EXPERIENCE OF AMICUS MCAA

The MCAA traces its beginning to 1889, when seventy heating contractors from thirty-five cities and twenty states formed the Master Steam and Hot Water Fitters National Association. The organization is now comprised of more than 1,300 mechanical contracting firms of all sizes across the country. Members of MCAA install mechanical systems in power plants, hospitals, factories, skyscrapers, and public buildings throughout the United States.

MCAA is a joint sponsor of apprenticeship programs throughout the country. Its rigorous programs combine intensive classroom preparation with on-the-job training.

MCAA has a safety committee whose mandate is the curtailment of the human and economic toll taken by construction accidents. The safety committee provides contractors with up-to-date information on safety programs and regulations and other instructional materials to promote job-site safety.

II. REASONS FOR GRANTING CERTIORARI

The job-site ratio involved in this litigation was properly upheld by the trial court as "an occupational training requirement enacted to protect public safety," in the face of a challenge under the preemption provision of the Employee Retirement and Income Security Act (ERISA), 29 U.S.C. § 1144. The holding by the Court of Appeals that ERISA preempts the job-site ratio rule should be reviewed by this Court for three reasons: (a) it would effectively disable Minnesota (and other states) in the licensing of construction-related workers; (b) it would disrupt the proper balance between federal and state spheres of interest; and (c) it could prevent states from enacting

measures to preserve public safety, thereby endangering workers, the public, and property.

A. Impact on Local Licensing

The states customarily regulate and, in some cases, restrict persons who perform certain phases of construction work. These regulations assume many forms. A number of states (or local units of government) prescribe minimum experience requirements. Some mandate that examinations be passed in order to perform the work. A few, like Minnesota, have established minimum job-site requirements.

These regulations apply throughout the construction industry. They affect not only pipefitters (often referred to as steamfitters), but in various forms, they pertain as well to electricians, plumbers and other persons involved in the building trades. The measures are geared to assuring that persons performing inherently dangerous work are minimally competent to undertake it and that inexperienced workers are properly supervised. Without these regulations, unqualified and inadequately supervised workers could become engaged in hazardous tasks, endangering not only themselves, but also co-workers and the public at large.

The need for continuing comprehensive safety regulation at the local level is quite apparent. In 1989, approximately 20 percent of accidental fatalities in the private sector work force (consisting of 8 industry divisions) occurred in the construction industry, even though construction covered less than 6 percent of the total work force.[1] In 1988, the highest rate of incidence of occupational injury in terms of lost workdays, after that of the mining industry, was experienced in the construction industry.[2]

---

[1] National Safety Council, *Accident Facts* 34 (1990 ed.).

[2] *Id.* at 46-47.

The ruling below seriously erodes the ability of Minnesota, as well as other states and local units of government, to regulate safety at construction sites. The argument advanced by Respondents, and accepted by the Court of Appeals, is that the imposition of a job-site ratio requirement for apprentices interferes with employee training programs conducted by employers and, therefore, is preempted by ERISA. The intrusion supposedly occurs because compliance with the 1:1 and 1:3 ratio requirements adopted by Minnesota would somehow affect, or require changes in, employers' apprentice-training programs, each of which, according to the Court of Appeals, constitutes an "employee welfare benefit plan" under ERISA.

Under this rationale, the ERISA preemption provision could be extended to other forms of state regulation. Requirements that apprentices be supervised by licensed personnel, that they undergo a specified period of training before being eligible for licensure, or that they pass an examination as a condition for licensure could be vulnerable to preemption by reason of the Court of Appeals' holding below.

In particular, a state or other governmental unit could be said to have affected an "employee welfare benefit plan" by prescribing some form of supervision, by mandating some period of training, and by requiring passage of any examination. For example, compelling all apprentices to take an examination, as required in Minnesota and other states, could be said to be even more burdensome than the job-site ratio rule because the subject matter of the examination might affect the content of the courses taught to apprentices in employer-run training programs, which could be considered employee welfare benefit plans under the Eighth Circuit's decision. Further, under the reasoning of the Court of Appeals, an employer may merely establish some form of training program, whether formal or informal, and the employer could be immune from *all* state regulation of apprentices.

In short, the ruling below, if upheld, would not merely prohibit states, like Minnesota and several others, from requiring job-site supervision of apprentices, but it also could be applied to proscribe other aspects of the licensing process. More ominously, the ruling below could portend the nullification of any efforts by states or other units of government to prohibit work by unlicensed individuals on construction projects. Regulations of a state or other jurisdiction that prohibit unlicensed individuals from performing construction work could collide with the ERISA preemption provision because such a prohibition may have much more significant consequences for employee training programs than the less intrusive impact of a job-site ratio requirement. Therefore, the ruling of the Court of Appeals could emasculate all state licensing relating to the construction trades under the rubric of ERISA preemption.

This Court should address the potentially pernicious effect of the ruling below by granting certiorari and clarifying the scope of the ERISA preemption clause as it concerns occupational licensing by states and other units of local government.

B. Intrusion On Federalism

The ruling below also warrants review by this Court because of its impact on the relationship between the federal government and the states. Minnesota and other states have traditionally regulated apprenticeship work in the construction trades. This Court has been solicitous of maintaining a proper balance between federal and state interests in this area, and this concern has been particularly reflected in its treatment of ERISA preemption claims. The interpretation of the preemption clause "must be guided by respect for the separate spheres of governmental authority preserved by our federalist system." *Allessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981). *See also Fort Halifax Packing Co. v.*

Coyne, 482 U.S. 1, 19 (1987); *Aetna Life Insurance Co. v. Borges*, 869 F.2d 142, 144 (2d Cir.), *cert. denied*, 110 S. Ct. 57 (1989); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978) ("The historic police powers of the states were not to be suppressed by federal acts unless that was the clear and manifest purpose of Congress").

The analysis of the Court of Appeals tramples the principle of federalism and could effectively bar states from regulating any aspect of the employment of apprentices or unlicensed individuals engaged in construction work. Congress has not expressly preempted regulation of apprentices through job-site ratio or other requirements. Therefore, the Minnesota job-site ratio rule does not conflict with any articulated federal policy. Because there is "no prospect of conflict with the federal statute, there is no warrant for disabling [Minnesota] from attempting to address uniquely local social and economic problems." *Fort Halifax*, 482 U.S. at 19. *See also Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 740 (1985) (upholding state statute mandating that minimum health care be provided under insurance policies issued in Massachusetts).[3]

C. Protecting Safety Measures

Safety concerns are central to the Minnesota regulation and other regulations similar to it. High pressure pipefitting is indisputably extremely dangerous work. If the work is not performed properly, individual workers,

[3] Rather than conflicting with federal policy, the job-site ratio rule is consistent with it. Fitzgerald Act, 29 U.S.C. § 50, *et seq.*, authorizes the states to adopt and enforce voluntary apprenticeship programs, including prescribed job-site ratios. While the Act contemplates voluntary subscription to ratios, it reflects a federal policy favorable to the establishment of job-site ratios and the recognition that states should be left free to prescribe precise numerical ratios. The adoption of such ratios under the auspices of the Fitzgerald Act represents an example of cooperative federalism that should not be thwarted by ERISA pre-emption. *Rebaldo v. Cuomo*, 749 F.2d 133, 140 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985).

fellow employees, and the public at large are at risk. As the Court of Appeals itself recognized, "[h]igh-pressure pipefitting is a very dangerous activity; most of the work is not visible when residential or commercial construction is completed, and poor work can cause explosions." *Boise Cascade Corp. v. Peterson*, 939 F.2d 632, 634 (8th Cir. 1991). In fact, there have been a number of industrial accidents attributable to high pressure pipefitting throughout the country in recent years.

The risk that improperly installed equipment could result in a rupture or explosion jeopardizing life and property is a real and legitimate state concern. Job-site ratios, coupled with other regulatory measures, reflect state efforts to assure that minimally-qualified individuals perform this dangerous work. For these reasons, the states and other local units of government rightfully have an interest in enacting regulatory measures to protect the public. Such measures should not be cast aside by an unwarranted finding of preemption under ERISA, absent an express intent by Congress to preempt this traditional area of state regulation. The Court of Appeals, simply stated, has gone too far.

CONCLUSION

For the foregoing reasons, Amicus Curiae Mechanical Contractors Association of America respectfully requests that the Writ of Certiorari be granted.

Respectfully submitted,

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In The

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October Term, 1991

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-and-

MINNESOTA MECHANICAL CONTRACTORS ASSOCIATION, INC.,

Petitioners,

vs.

BOISE CASCADE CORPORATION, A DELAWARE CORPORATION, BE&K CONSTRUCTION COMPANY, A DELAWARE CORPORATION, CHARLES L. LEE, RELCO UNISYSTEMS CORPORATION, A MINNESOTA CORPORATION, FORREST DAHMES, MID-STATES MECHANICAL SERVICES, INC., A MINNESOTA CORPORATION AND KRISTINE SOUTHARD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTIONS PRESENTED

1. Does the Employee Retirement Income Security Act ("ERISA") preempt a state-mandated ratio of apprentices to journeymen for apprenticeship training programs which are employee welfare benefit plans under ERISA?

2. Does ERISA's "savings clause" protect from preemption a ratio of apprentices to journeymen promulgated as a general state regulation applied to all ERISA apprenticeship training plans?

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No. 91-707

In The

Supreme Court of the United States

October Term, 1991

JOHN B. LENNES, JR., COMMISSIONER OF THE DEPARTMENT OF LABOR AND INDUSTRY, STATE OF MINNESOTA,

-and-

MINNESOTA MECHANICAL CONTRACTORS ASSOCIATION, INC.,

Petitioners,

vs.

BOISE CASCADE CORPORATION, A DELAWARE CORPORATION, BE&K CONSTRUCTION COMPANY, A DELAWARE CORPORATION, CHARLES L. LEE, RELCO UNISYSTEMS CORPORATION, A MINNESOTA CORPORATION, FORREST DAHMES, MID-STATES MECHANICAL SERVICES, INC., A MINNESOTA CORPORATION AND KRISTINE SOUTHARD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request this Court deny the Petition for Writ of Certiorari seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at 939 F.2d 632.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit is published at 939 F.2d 632 (July 29, 1991). The decision of the United States District Court for the District of Minnesota is published at 735 F. Supp. 1434 (April 27, 1990). The Report and Recommendations of the United States Magistrate, rendered on March 30, 1990, were not published.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Supremacy Clause, Article VI, clause 2 of the United States Constitution; the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1003(a), 1144(a), and 1144(d); Minnesota Statutes § 326.48, and Minnesota Rules §§ 5230.0040 to 5230.0110.

STATEMENT OF THE CASE[1]

This case arises out of the avowed efforts of the State of Minnesota to regulate the training of pipefitter apprentices, including training provided as a benefit by ERISA welfare plans. Respondents provide on-the-job training benefits to their apprentice employees through employee benefit plans which are governed by ERISA. The State of Minnesota has adopted a rule

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1. Respondents object to Petitioners' Statement of Facts regarding the need, purpose and effect of the apprentice journeyman ratio rule in dispute in this case and the development and operation of apprentice training programs in Minnesota. Finally, Respondents note that Petitioners seek certiorari of the denial of Petitioners' motion for summary judgment and the factual assertions in Respondents' affidavits were assumed to be true. Petitioners' Appendix (hereinafter referred to as "Pet. App.") at p. 39a. Accordingly, the facts contained therein, and not the Petitioners Statement of the Facts, must be accepted as the facts of this case.

which is intended to directly regulate these apprentice training plans, including how and to whom the training is provided. The Eighth Circuit struck down the Minnesota rule on the grounds it is preempted by ERISA. There is no reason for the Supreme Court to review this decision which is a straightforward application of well-settled ERISA preemption principles.

Respondents all have comprehensive apprenticeship training programs for their high pressure pipefitter apprentice employees. These comprehensive training programs provide both on-the-job training and formal classroom instruction. The benefit these plans provide is training which includes on-the-job instruction by more experienced employees who are licensed pipefitters. On-the-job training is a critical part of Respondents' training programs. Historically, Respondents determined the ratio of journeymen to apprentice pipefitters on each pipefitting jobsite on a project by project basis.

On January 22, 1990, the Minnesota Department of Labor and Industry ("Department"), by order of the Department's Commissioner ("Commissioner") adopted a new rule which, for the first time, established a 3:1 (ratio of licensed pipefitters to pipefitter apprentices on all high-pressure piping job sites in Minnesota (the "Minnesota rule").[2] The rule is not, as Petitioners claim, a benign "jobsite ratio," which is integral to the licensing, but not the training, of pipefitters. The clear and stated purpose of the rule is to regulate the training of pipefitter apprentices in

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2. The new rule is unprecedented in Minnesota and is unique to the entire United States. Minnesota is one of only five states in the nation which even licenses high-pressure pipefitters. Only one other state in the nation imposes any ratio, and that state, New Mexico, permits three apprentices per journeyman. The ratio of licensed pipefitters to pipefitter apprentices on a given jobsite has never been regulated by the state, but has instead always been left to the employer, or to collective bargaining.

Minnesota. *See* Pet. App. at pp. 78a-79a. This controversy concerns the Department's authority, in light of federal ERISA preemption standards, to regulate the manner in which apprentice pipefitters are trained by employers who provide training benefits in the context of employee welfare benefit plans governed by ERISA. The district court explicitly recognized that "the 3-to-1 rule is an effort by Minnesota to regulate the training of apprentice pipefitters and will necessarily affect pipefitter training programs." Pet. App. at p. 24a. The Eighth Circuit also concluded the purpose of the rule is to regulate training, and succinctly stated, "[t]his case arises out of the efforts of the State of Minnesota to regulate the training of pipefitter apprentices." Pet. App. at p. 3a. Thus, while Petitioners desperately attempt to portray the rule as pertaining to occupational licensing, in fact this controversy turns on the question of the state's power to regulate ERISA training plans.

Petitioners have agreed that Respondents' pipefitter apprenticeship training programs are "employee welfare benefit plans" as defined by ERISA, as they must since the ERISA definition of an employee welfare benefit plan specifically includes "apprenticeship or other training programs." 29 U.S.C. § 1002(1). Accordingly, at each level of judicial review the question in this case has been relatively simple: whether the state can impose the ratio rule, which "relates to" the ERISA benefit plans of Respondents (and other employers), in light of tha broad sweep of ERISA preemption which is intended to make ERISA plans exclusively ~~a federal~~ concern.

Both the district court and the Eighth Circuit have, in fact, expressly recognized that the rule does directly affect the terms and conditions of Respondents' ERISA plans. In its opinion, the district court explicitly acknowledged this substantial impact in finding that the rule "limits the number of participants in the training program and affects how training can be done. It also

imposes higher cost on plan administrators who must hire more journeymen to supervise their apprentices . . . it does affect the form and amount of training received by each participant." Pet. App. at pp. 27a-30a.

In determining the rule was preempted, the Eighth Circuit held that the rule sought to and did materially affect Respondents' ERISA training plans: "[T]he minimum jobsite ratio directly affects an ERISA plan: it regulates, and was clearly intended to regulate, certain terms and conditions of apprenticeship programs by establishing the manner in which employers can train and employ both journeymen and apprentice pipefitters." Pet. App. at p. 12a.

Despite Petitioners' exaggerated claims, this is a straightforward case in which the Eighth Circuit applied ERISA's clear statutory mandate and well-settled legal precedent to preempt a state law which directly relates to employee welfare benefit plans governed by ERISA.

SUMMARY OF ARGUMENT

Petitioners seek review of the Eighth Circuit's decision below on fundamentally three grounds. First, Petitioners contend that the Supreme Court should grant review to resolve an alleged conflict among the decisions of this Court and purported confusion among the circuit courts as to whether ERISA preempts generally applicable state statutes which are traditional exercises of state police power. Petitioners suggest that generally applicable state statutes and state statutes which do not require the creation of an ERISA plan are not preempted by ERISA. In fact, there is no conflict among the decisions of the Supreme Court and no confusion or uncertainty on the part of the circuit courts concerning the scope of ERISA preemption. Moreover, the arguments advanced by Petitioners are not new. On the contrary,

these theories were asserted years ago and have been uniformly and consistently rejected by the Supreme Court and the circuit courts. The uniformity with which this Court and the circuit courts have articulated and applied the well-settled principles of ERISA preemption conclusively establish that there is no need to review the Eighth Circuit's decision in this case.

Second, Petitioners argue that the Eighth Circuit incorrectly applied existing legal precedent in concluding that the rule is preempted by ERISA. While Petitioners seeks to justify their claims through the use of inflated rhetoric, the Eighth Circuit's decision is an application of established preemption principles to a rule which is clearly preempted under the ERISA preemption standards anticipated by this Court. The Eighth Circuit concluded that the rule before it was intended to regulate and did regulate the terms and conditions of Respondents' ERISA plans after carefully analyzing applicable ERISA preemption precedent from the Supreme Court and the circuit courts. Therefore, the decision below is not a departure from, or in conflict with, established legal precedent in the area of ERISA preemption, but instead represents a proper application of these principles to the case before it.

Finally, Petitioners argue that the state law at issue here is saved from preemption by the existence of a federal statute, the Fitzgerald Act. A cursory glance at the Fitzgerald Act reveals the frivolous nature of this argument. First, the Fitzgerald Act is inapplicable to Respondents' ERISA plans. Second, the Fitzgerald Act is only four sentences in length and has no substantive, provisions at all. It is simply a general policy statement acknowledging the benefits of apprentice programs. The Act was enacted some 37 years before ERISA and cannot be viewed as a congressional limitation on the scope of ERISA. Neither the Fitzgerald Act, nor the federal regulations promulgated under it establish any substantive regulations or mandate a specific ratio

of apprentices to journeymen for apprenticeship training programs. While the state may serve as an agent for the federal government in verifying compliance with certain federal standards in registering apprenticeship training programs with the United States Department of Labor, nothing in the federal law even hints at the ratio rule which is at issue here. Therefore, where, as here, the state imposes as a matter of state law requirements not mandated by federal law, those requirements are subject to preemption. The federal exemption argument made by Petitioners is therefore without merit.

REASONS FOR DENYING THE WRIT[3]

A. The Supreme Court Has Articulated a Clear Standard for ERISA Preemption.

Section 514(a) of ERISA provides, in relevant part, that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." 29 U.S.C. § 1144(a) (1985). ERISA defines employee welfare benefit plans as any ERISA "plan, fund or program" providing "apprenticeship or other training programs." 29 U.S.C. § 1002(1). The United States Supreme Court has taken a broad and expansive view of ERISA's preemptive effect. The United States Supreme Court has, time and time again, and with remarkable consistency, held that ERISA preempts all state laws which "relate to"

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3. The following section sets forth the substantive reasons why the petition should be denied. As a threshold matter, however the procedural posture of the case does not lend itself to review. The decision of the Eighth Circuit does not represent a final judgment in this case. The district court granted Petitioners' motion for summary judgment. The Eighth Circuit reversed that decision. A final judgment has not been entered in the district court. In cases in which judgment is not final, this court has generally not exercised its appellate jurisdiction under 28 U.S.C. § 1254. Accordingly, the Court should decline to review this case.

employee benefit plans.

The "relates to" language of Section 514(a) is so broad that it has been recognized as an example of the maximum extent of federal preemption. *See Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987). The United States Supreme Court has further recognized that the ERISA preemption clause is "conspicuous for its breadth" and "establishes as an area of exclusive federal concern the subject of every State law that 'relate(s) to' an employee benefit plan governed by ERISA." *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990). The principle that the broad scope of ERISA preempts all state laws which "relate to" employee benefit plans has been so frequently enunciated by this Court and the circuit courts that it is now "black letter law." *See, e.g., Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Baxter v. Lynn*, 886 F.2d 182 (8th Cir. 1989); *General Elec. Co. v. New York State Dept. of Labor*, 891 F.2d 25 (2nd Cir. 1989), *cert. denied*, 110 S. Ct. 2603 (1990); *Hydrostorage Inc. v. Northern Cal. Boilermakers Joint Apprenticeship Comm.*, 891 F.2d 719 (9th Cir, 1989), *cert. denied*, 111 S. Ct. 72 (1990). It is this "black letter law" that the Eighth Circuit properly applied in this case.

In *Shaw v. Delta Air Lines, Inc,*, 463 U.S. 85 (1983), the Supreme Court's most significant decision in this area, the Court carefully articulated the scope and limits of ERISA preemption. At issue in *Shaw* were two New York state statutes of general application. The laws did not directly affect the administration of employee benefit plans, but they did regulate eligibility for and participation in such plans. In *Shaw*, the Supreme Court held that ERISA preempts not only statutes which expressly conflict or compete with the provisions of ERISA, but it also preempts those statutes which do not conflict with ERISA, and even statutes which address issues not covered by ERISA at all, if these state

laws "relate to" ERISA benefit plans.

In reviewing the scope of § 514(a)'s preemption of all state laws which "relate to" ERISA plans, the Supreme Court first noted that the scope of a federal law's preemption of a state statute is determined by ascertaining congressional intent in enacting the federal law at issue. Looking first to congressional intent as reflected in the language of ERISA's preemption clause, the Supreme Court applied the *Black's Law Dictionary* definition of "relate," and refused to accept the claim (made again now by Petitioners) that the "relate to" phrase should be narrowly interpreted: "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Id.* at 96-97 (footnotes omitted) (citations omitted). The Supreme Court then expressly rejected the argument that ERISA preempted only state laws which deal with the specific subject matter regulated by ERISA.

In 1988, the Supreme Court reiterated the ERISA preemption principles enunciated in *Shaw*. In *Mackey v. Lanier Collections Agency & Serv., Inc.*, 486 U.S. 825 (1988), the Court held that state statutes which, like the rule in the instant case, are specifically designed to affect ERISA employee welfare benefit plans are subject to ERISA preemption without the need for any further analysis. *Id.* at 829-830. The state law at question in *Mackey* was a state garnishment statute of general applicatlon that contained an express exception for monies held in an employee benefit plan. The Court held that the statute's provision which *exempted* ERISA plan funds from the effect of the statute was preempted because it was "designed to affect" employee benefit plans. The Court stated that, " . . . since our decision in *Shaw* . . . we have virtually taken it for granted that state laws that are 'specifically designed to affect employee benefit plans' are preempted under § 514(a) . . . ." The Court further stated that, "The pre-emption provision [of § 514(a)] . . . displace[s] all state laws that fall within its sphere,

even including state laws that are consistent with ERISA's substantive requirements . . . legislative 'good intentions' do not save a state law within the broad preemptive scope of § 514(a)." *Id.* (internal citations omitted). The *Mackey* standard of ERISA preemption, which requires even less analysis than the "relates to" standard, applies to any state law which expressly references to an ERISA plan, or is specifically designed to effect an ERISA plan. *Mackey* does not displace or narrow the *Shaw* "relates to" standard; instead it simply provides an alternative threshold analysis for state laws that are clearly preempted on their face because they make reference to or are designed to affect ERISA plans.

In the 1990 Term, the Supreme Court once again applied the *Shaw* and *Mackey* preemptions standards in *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990), and in *FMC Corp. v. Holliday*, 111 S. Ct. 403 (1990). In *Ingersoll-Rand*, as it has so often done in the past, the Court reaffirmed the basic principle of ERISA preemption articulated in *Shaw* and refined in subsequent cases. In striking down a Texas employment discharge provision on the grounds it was expressly preempted by ERISA, the Court reiterated that the "relates to" standard established in *Shaw* is the basic principle of ERISA preemption. The Court also recognized and then applied the ERISA preemption standard articulated in *Mackey*: state laws which make reference to or which are specifically designed to affect employee benefit plans are preempted under Section 514(a) of ERISA. The Court explicitly acknowledged that while the statute at issue in *Mackey* did not regulate the terms or conditions of ERISA-covered plans, the statute was nonetheless preempted because the state statute made reference to employee benefit plans. The Court also emphasized that preemption occurs "even if the law is not specifically designed to affect such plans, or the affect is only indirect." 111 S. Ct. at 483.

In *Ingersoll-Rand* the Court further held that one of the paramount purposes of the ERISA preemption statute is to prevent inconsistent or conflicting state regulation of ERISA plans. The Court reasoned as follows:

> . . . Section 514(a) was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefit law; the goal was to minimize administrative and financial burden of complying with the conflicting directives among States or between States and the Federal Government. Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries. Allowing state actions like the one at issue here would subject plans and plan sponsors to burdens not unlike those that Congress sought to foreclose through Section 514(a). Particularly disruptive is the potential for conflict in substantive law . . . . Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement.

Id. at 484 (citations omitted).

The well-settled principles of ERISA preemption were similarly articulated in *FMC Corp. v. Holliday,* 111 S. Ct. 403 (1990). The Court reiterated that state laws of general application, as well as those laws specifically designed to affect employee benefit plans, must give way before ERISA's broad preemptive scope. "We made clear in *Shaw v. Delta Airlines, supra,* that a law relates to an employee welfare plan if it has 'a connection with or reference to such a plan' " and, "we have not hesitated to apply ERISA's preemption clause to state laws that risk subjecting plan administrators to conflicting state regulations." *Id.* at 407-408.

The essential rationale which was initially articulated by *Shaw* and which continues to be the law is clear: to achieve Congress' purpose, ERISA's broad preemptive scope must be read to preempt all state laws which directly or indirectly relate to, (even if not in conflict with), ERISA plans, including state laws of general application. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

B. The Circuit Courts Have Uniformly Adhered to the Supreme Court Standards of Broad ERISA Preemption.

The circuit courts have consistently applied the ERISA preemption principles enunciated by the United States Supreme Court. A survey of the circuit court decisions reveals no confusion or uncertainty. On the contrary, there is remarkable consistency in the application of ERISA preemption law to a wide variety of state laws, rules and regulations. The circuit courts have properly followed the Supreme Court by holding that the broad scope of ERISA preempts generally applicable statutes, preempts laws which are traditional exercises of state police power, and is not limited in scope to only those state laws which are intended to directly effect ERISA plans. *See Gahn v. Allstate Life Ins. Co.*, 926 F.2d 1449 (5th Cir. 1991) (ERISA preemption of state "abuse of rights" doctrine, a law of general application); *Settles v. Golden Rule Ins. Co.*, 927 F.2d 505 (10th Cir. 1991) (ERISA preemption of state wrongful death law); *Blue Cross & Blue Shield v. Dept. of Banking*, 791 F.2d 1501 (11th Cir. 1986) (ERISA preemption of state law of general applicability — Unclaimed Property Act); *Gilbert v. Burlington Indus., Inc.*, 765 F.2d 320, 327 (2d Cir. 1985), (". . . we made clear that to avoid preemption it is not sufficient that the state statute represent the exercise of a traditional police power."), *aff'd mem.*, 477 U.S. 901 (1986).

The uniformity with which the Supreme Court's ERISA preemption principles have been applied is readily demonstrated

The *Shaw* "relates to" test has been explicitly adopted by the First, Third, Fourth, Fifth, Sixth, Seventh, Tenth and Eleventh Circuits. *See, e.g., Wadsworth v. Whaland*, 562 F.2d 70, 76-77, n. 31 (1st Cir. 1977), *cert. denied*, 435 U. S. 980 (1978); *FMC Corp. v. Holliday*, 885 F.2d 79, 85 (3rd Cir. 1989), *vacated on other grounds*, 111 S. Ct. 403 (1990); *Salomon v. Transamerica Occidental Life Ins. Co.*, 801 F.2d 659, 661 (4th Cir. 1986); *Matter of Dyke*, 943 F.2d 1435, 1447 n. 31 (5th Cir. 1991); *Authier v. Ginsburg*, 757 F.2d 796, 799 (6th Cir. 1985), *cert. denied*, 474 U.S. 888 (1985); *Savings & Profit Sharing Fund of Sears Employee v. Gago*, 717 F.2d 1038, 1040 (7th Cir. 1983); *Straub v. Western Union Tel. Co.*, 851 F.2d 1262 (10th Cir. 1988); *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1242-45 (11th Cir. 1989). The Eighth Circuit, in a long line of cases, likewise has held that ERISA preempts state laws, including generally applicable state laws, which directly or indirectly "relate to" employee benefit plans. *See, e.g., Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1214-15 (8th Cir. 1981), *cert. denied*, 454 U. S. 988 (1981); *Baxter v. Lynn*, 888 F.2d 182, 185 (8th Cir. 1989); *In re Life Ins. Co. of North America*, 857 F.2d 1190, 1194 (8th Cir. 1988).

While the Second and Ninth Circuits at one time seemingly articulated a more stringent preemption standard, these circuit courts have now abandoned that standard and have applied the Supreme Court mandated "relates to" test. *See Howard v. Gleason Corp.*, 901 F.2d 1154, 1157 (2nd Cir. 1990); *Gibson v. Prudential Ins. Co. of America*, 915 F.2d 414, 416 (9th Cir. 1990). The Supreme Court, and every circuit court, uniformly agree that state laws which, directly or indirectly, regulate the terms or conditions of ERISA plans, including laws of general application, are preempted. *See Shaw*, 463 U.S. 85 (1983); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Standard Oil Co. of Cal. v. Agsalud*, 633 F.2d 760 (9th Cir. 1990), *aff'd mem.*, 454 U.S. 801 (1981); *Baxter v. Lynn*, 886 F.2d 182 (8th Cir. 1989); *General Electric Co. v. New York Dept. of Labor*, 891 F.2d 25 (2d Cir.

1989), *cert. denied,* 110 S. Ct. 2603 (1990); *Iron Workers Pension Fund v. Terotechnology,* 891 F.2d 548 (5th Cir. 1990), *cert. denied,* 110 S. Ct. 3272 (1990); *Holland v. Burlington Indust., Inc.,* 772 F.2d 1140 (4th Cir. 1985), *aff'd mem.,* 477 U.S. 901 (1986), and *cert. denied,* 477 U.S. 903 (1986).

These same principles of ERISA preemption have been specifically applied to state laws regarding apprentice training programs. The Ninth Circuit has on three occasions preempted laws dealing directly with apprenticeship training programs in the two cases that have come before this Court, the Court affirmed one decision and declined to review the other, thus demonstrating that the Eighth Circuit properly found the Minnesota rule is preempted by ERISA. In *Local Union 598, Plumbers & Pipefitters Industry Journeyman & Appentices Training Fund v. J. A. Jones Construction Co.,* 846 F.2d 1213 (9th Cir. 1988), *aff'd mem.,* 488 U.S. 881 (1988), the Ninth Circuit invalidated a state "prevailing benefit" law applicable to apprentices, concluding that it related to, and purported to regulate the terms of, appellants' apprenticeship training programs. The court noted that ERISA's preemption provision is so broad as to be "virtually unique," and that "[s]tatutes regulating contributions to ERISA plans have consistently been held preempted." *Id.* at 1218. It also rejected the defense that the state law was an exercise of traditional police power, noting that to escape preemption the law "must also affect the plan 'in too tenuous, remote, or peripheral a manner to warrant a finding that the law "relates to" the plan.' " *Id.* at 1221 (quoting *Gilbert,* 765 F.2d at 327, and *Shaw,* 463 U.S. at 100, n. 21).

Subsequently, in *Hydrostorage Inc. v. North California Boilermakers Local Joint Apprenticeship Committee,* 891 F.2d 719 (9th Cir. 1989), *cert. denied,* 111 S. Ct. 72 (1990), the Ninth Circuit struck down a California law which required Hydrostorage, a company that had no ERISA plan, to participate in an apprentice

training program and conform to certain journeyman-apprentice jobsite ratios. The Ninth Circuit applied the *Shaw* principles to preempt the state-mandated apprentice ratio rule. The legal conclusion reached in *Hydrostorage*, a case which this Court declined to review, has direct applicability here: ratio requirements for apprenticeship training programs are not free from preemption as "local concerns" or traditional exercises of police power, but relate to and regulate ERISA plans, and are therefore preempted by ERISA. Just as the employer who had no ERISA plan could not be compelled by a state to adopt a training ratio, so too, Respondents cannot be compelled by Minnesota to adopt such a ratio as part of their ERISA plans.

Finally, in *Electrical Joint Apprentice Committee v. McDonald*, Nos. 90-15095, 90-15395, 1991 WL 227779 (9th Cir. Nov. 8, 1991),[4] the Ninth Circuit once again invalidated on ERISA preemption grounds a state law which related to apprenticeship training programs. In reaching its conclusion, the circuit court both applied *Hydrostorage* and invoked the Eighth Circuit decision in this case as supporting authority.

Thus, the Supreme Court and the circuit courts have carefully developed a uniform body of ERISA preemption law in which *Shaw* is the keystone. Clarity and consistency, not confusion and consternation, mark this area of the law. The Supreme Court reaffirmed these basic principles and the underlying rationale for ERISA preemption in *Ingersoll-Rand* and *Holliday* in the 1990 Term. More specifically, the decisions in *McDonald*, *Hydrostorage*, *J.A. Jones* and the decision in this case demonstrate

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4. The state law at issue in *McDonald* was a prevailing wage statute applicable to all contractors on public works projects which provided exceptions for certain apprenticeship programs, but not for other programs. The court concluded that the law required sponsors of ERISA apprenticeship programs to comply with state imposed standards, and thus the law was preempted.

that both the Ninth Circuit and the Eighth Circuit — the only circuit courts which have carefully addressed ERISA preemption principles in the context of state laws relating to apprenticeship training programs have reached uniform and consistent conclusions based on the same, well-settled ERISA preemption principles established by this Court in *Shaw* and its progeny.

C. The Eighth Circuit Properly Applied Well-Settled ERISA Preemption Standards to the Preempt Rule.

The parties have stipulated, and the district court and the Eighth Circuit found, that Respondents' apprenticeship training programs are "employee welfare benefit plans" falling within the scope of ERISA. Therefore, the only question presented to the Eighth Circuit in this case was whether the rule's ratio requirement "relates to" Respondents' apprenticeship training programs.

Minnesota's rule is not a law of general application which affects the entire population. Rather, Minnesota's rule applies only to on-the job training of high pressure pipefitter apprentices. The rule is intended to, and does regulate and establish certain standards for on-the-job training of apprentice pipefitters. Since on-the-job training is a benefit governed by ERISA, and since the rule requires Respondents to change their plans to conform to the state-mandated ratio, it is both expressly directed toward, and specifically designed to affect Respondents' employee benefit plans. It is therefore clearly preempted by ERISA.

The Eighth Circuit recognized the purpose and effect of the rule in reaching the conclusion that the rule was preempted by ERISA:

> "We conclude that the minimum jobsite ratio rule "relates to" employee benefit plans covered by ERISA, that is, plaintiffs' apprenticeship

> programs, within the meaning of ERISA's Section 514(a). *See Hydrostorage*, 891 F.2d at 729-31. The minimum jobsite rule was specifically designed to affect employee benefit plans. The very purpose of the minimum jobsite ratio rule was to require plaintiffs and other employers to train their apprentices in accordance with the minimum jobsite ratio rule. Application of the minimum jobsite ratio rule would also have exposed plaintiffs and other employers to conflicting or inconsistent state and local regulations. "[W]here a 'patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation,' [the Supreme Court has] applied the preemption clause to insure that benefit plans will be governed by only a single set of regulations."

See Pet. App. at pp. 10a-11a (citations omitted).

Petitioners' hyperbolic claim that the Eighth Circuit's decision represents a radical extension of established preemption principles is not borne out by either the facts of this case or the Eighth Circuit's decision. In reaching its decision, the Eighth Circuit acknowledged the distinction between an employee benefit plan and a "benefit," a distinction critical to the Supreme Court's decision in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). Then, the Eighth Circuit explicitly recognized and applied the ERISA preemption standards established by the Supreme Court in *Shaw*, and it fully recognized the proper limits on ERISA preemption. Pet. App. at pp. 8a-9a. Thus, the legal framework in which the Eighth Circuit analyzed the rule is, without question, squarely within established precedent.

The Eighth Circuit's application of these legal principles to the rule further demonstrates that its decision is consistent with,

not a departure from, existing case law. In reaching the conclusion that the rule "relates to" employee benefit *plans* covered by ERISA, and not merely benefits, the Eighth Circuit emphasized that the rule "was specifically designed to affect employee benefit plans." Pet. App. at p. 11a. The very purpose of the rule, the Eighth Circuit concluded, was to regulate the manner in which Respondents and other employers trained their apprentices in training programs undisputedly covered by ERISA. In addition, the Eighth Circuit found that the rule would have exposed Respondents and other employers to conflicting or inconsistent state and local regulations, the very evil which the Supreme Court has recognized as one of the underlying purposes served by broad preemption. In recognizing this important purpose of ERISA preemption, the Eighth Circuit relied on and applied the rationale stated in this Court's decision in *Shaw* and followed in *Holliday*. *See* Pet. App. at p. 11a.

Petitioners suggest the Eighth Circuit ignored the limits of ERISA preemption. This claim, like petitioners' other rhetoric, finds no basis in the court's decision. In fact, the Eighth Circuit carefully considered this very question in light of applicable Supreme Court precedent. The Eighth Circuit, citing *Shaw*, articulated the proper limits of ERISA preemption, acknowledging that the ratio rule would not be preempted if it affected respondents' apprenticeship programs in "too tenuous, remote, or peripheral a manner to warrant a finding that the [rule] 'relates to' the plan[s]." *See* Pet. App. at p. 8a. Clearly, the Eighth Circuit understood the proper limits of ERISA preemption, and it correctly applied these principles in concluding that:

> We agreed that the minimum jobsite ratio rule is an exercise of traditional state regulatory power over occupational training. *However, we cannot agree that its effect on the apprenticeship programs is so tenuous, remote or peripheral to allow us to*

> *conclude it does not "relate to" them.* The minimum jobsite ratio rule directly affects an ERISA plan; it regulates, and was clearly intended to regulate, certain terms and conditions of the apprenticeship programs by establishing the manner in which employers can train and employ both journeymen and apprentice pipefitters.

See Pet. App. at p. 12a (emphasis added). Accordingly, while the Eighth Circuit acknowledged petitioners' claim that the ratio rule was "an occupational training requirement," the rule nevertheless "related to" respondents' training plans, and therefore was preempted. *Id.*

The Eighth Circuit's decision represents a straightforward application of ERISA preemption principles. It does not signify conflict among the circuit courts in this area of the law. On the contrary, the Eighth Circuit's decision falls squarely within well-established precedent and demonstrates the uniformity with which the Supreme Court, the circuit courts and, specifically, the Eighth Circuit have developed and applied ERISA preemption law. Therefore, review of the Eighth Circuit's decision by this Court is not warranted.

D. Petitioners Have Mischaracterized the Legal Standards of ERISA Preemption, and Have Failed to Demonstrate Any Justification for Granting the Petition.

In their desperate attempt to create an issue worthy of this Court's consideration, petitioners have resurrected arguments to limit the scope of ERISA preemption which were long ago rejected by this Court and the circuit courts. For well over a decade the Supreme Court and the circuit courts have consistently rejected the notion that ERISA preemption does not extend to traditional exercises of police power, that ERISA, preempts only state laws

which regulate ERISA plans and does not preempt laws of general applicability, that laws which directly affect ERISA plans are preempted while those which indirectly affect ERISA plans are not, and that the purpose of a state law determines whether it is preempted by ERISA. Based on this sound and well-settled authority, petitioners' arguments must fail.

1. The Eighth Circuit's Decision Does Not Destroy the State's Regulatory Authority by Improperly Limiting the Exercise of Traditional Police Power.

Petitioners claim the Eighth Circuit failed to recognize the "constitutional balance between the states and the federal government," and thus erroneously extended ERISA preemption into an area of state regulation. Petitioners' Brief (hereinafter referred to as "Pet. Brief") at p. 9. The Supreme Court and the circuit courts have carefully considered and have already resolved the balance between the broad sweep of ERISA preemption and traditional state regulatory power. In *Alessi v. Raybestos-Manhattan Inc.*, 451 U.S. 504 (1981), the Supreme Court rejected the same objections raised here to ERISA preemption — a traditional exercise of police power; a law relating only indirectly to ERISA plans; a law intended to protect the interests of citizens of a state. In *Alessi*, the Court reviewed a New Jersey workers' compensation law. In this case, its first analysis of ERISA preemption, the Supreme Court began by resolving the same concern which petitioners now raise, some ten years later, that ERISA preemption "must be guided by respect for the separate spheres of governmental authority preserved in our federalist system." *Id.* at 522. The Supreme Court unanimously held the state law governing workers' compensation awards, "which obviously are subject to the State's police power," was preempted by ERISA because the law at least indirectly "related to" plans governed by ERISA. *Id.* at 524.

As the Supreme Court made clear in *Alessi*, the question is not the purpose of the state law, but whether its application relates to an ERISA plan: " *Whatever the purpose or purposes of the New Jersey statute,* we conclude it relate[s] to pension plans governed by ERISA . . . "

> *It is of no moment that New Jersey intrudes indirectly,* through a workers' compensation law rather than directly, through a statute called "Pension Regulation." *ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern* . . . . ERISA's authors clearly mean to preclude the State's from avoiding through form the substance of the preemption provision.

Id. at 524-25 (emphasis added). Therefore, the Minnesota rules' alleged goal of regulating occupational training provides no defense to ERISA preemption, even if it falls within an area traditionally reserved to the states.

Petitioners seek to justify their claim that the entire regulatory scheme of state government will collapse as a result of this decision by alleging that the rule is a law of "general application." Petitioners purport that, "If the state law *applies generally,* then it does not have a 'connection with or reference to' ERISA plans and is *not preempted,"* Pet. Brief at p. 19 (emphasis added). In fact, the rule is not a law of "general application." Furthermore, petitioners' analysis has no basis in the law and is exactly contrary to the clearly stated decisions of this Court.

In *Shaw*, the Supreme Court considered whether ERISA preempts only laws which are specifically designed to affect or directly affect employee benefit plans. The Court confirmed that laws of general application, and statutes which address matters

not covered by ERISA at all, are preempted by the broad scope of ERISA preemption. *Shaw*, 463 U.S. at 96-100. In *Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. 825 (1988), the Court again emphasized that the preemption provision of ERISA displaces "all state laws" falling within its sphere, and that "legislative good intentions" do not save a state law within the scope of ERISA preemption. *Id.* at 829-830. The Court reiterated in *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990), that even if a law is not specifically intended to regulate ERISA plans, or even if the effect is only indirect, a law is nevertheless preempted if it "relates to" an employee benefit plan. *Id.* at 483. The circuit courts, like the Supreme Court, have consistently held that state laws of general application which are admittedly traditional exercises of police power are nevertheless preempted if they relate to an ERISA plan. Neither this rule nor the Eighth Circuit's decision present any new questions concerning either the issue of federalism or the scope of ERISA preemption which justify granting the petition.

2. There is No Regulatory Black Hole.

Petitioners, in a desperate attempt to demonstrate this case warrants Supreme Court review, predict the Eighth Circuit's decision will create "a regulatory black hole of mammoth proportions." Pet. Brief at p. 15. This argument, a blatant attempt to raise hysteria by alleging the collapse of state regulations, is without merit. The Eighth Circuit's decision does not implicate, and respondents have not challenged, the authority of Minnesota to license pipefitters or any other occupation.[5] The Eighth Circuit,

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5. Petitioners would have the Court believe that Minnesota's licensing system and its regulatory structure for high pressuring piping are "in jeopardy" by the decision of the Eighth Circuit in this case. Pet. Brief at p. 10. These assertions are false. The new rule does not affect the ability of the Department to license pipefitters, and the Eighth Circuit's invalidation of the rule does not

(Cont'd)

in concluding the Department acted impermissibly in attempting to regulate ERISA plans, did not destroy the state's power to license occupations, nor did it, as petitioners claim with their vastly inflated rhetoric, "sweep away all state laws that protect employees . . . ." Pet. Brief at p. 15.

Petitioners' claim that the Eighth Circuit's decision will destroy traditional state and local government police power flies in the face of scores of federal court decisions which have preempted state regulations under ERISA. For example, there is no evidence to support, or any reason to believe, that the Supreme Court's decision in *Shaw*, which preempted certain antidiscrimination statutes, destroyed the power of New York to enact and enforce antidiscrimination legislation. Similarly, the decision of the Ninth Circuit in *J.A. Jones*, which invalidated a state prevailing wage law relating to apprenticeship programs, did not destroy the ability of California to enact and enforce labor legislation or prevailing wage laws. And the Supreme Court's decision in *Alessi*, which invalidated a state law concerning the integration of workers' compensation awards and private pension plan benefits, did not preclude New Jersey from enacting and enforcing workers' compensation laws. If ERISA preemption did in fact pose such a dire threat to the traditional exercise of state police power, then this police power would have collapsed long

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(Cont'd)
undermine the Department's comprehensive regulatory scheme for licensing pipefitters or controlling the installation and operation of piping work in Minnesota. The installation and operation of high-pressure piping is subject to the detailed requirements of Minnesota's Power Piping Code, Minn. R. §§ 5230.0250-5230.1270, and the oversight of the Code Enforcement Division of the Department. The Code Enforcement Division must review and approve the plans for each proposed high pressure piping installation, issue a permit for the installation work before any work may begin and inspect the pipefitting work performed throughout the installation process. Then the entire piping system is subject to a final inspection.

ago with the enactment of ERISA preemption. Obviously, this has not occurred. Far from leaving a regulatory black hole, the Eighth Circuit's decision has simply prevented the Department from improperly intruding into the regulation of ERISA plans.

3. Petitioners Have Misstated the Law and this Court's Decision in an Attempt to Create a New Legal Structure for ERISA Preemption.

In their zeal to demonstrate the significance of this case, Petitioners have distorted and misstated ERISA preemption principles and the holdings of this Court in several decisions. Purporting to rely on *Mackey*, *Ingersoll-Rand*, and *Fort Halifax*, Petitioners have created, out of whole cloth, a new "structure" for ERISA preemption. Petitioners claim that in *Fort Halifax* and *Ingersoll-Rand* this Court "emphasized" there are two categories of laws which are not preempted by ERISA: first, those statutes that do not require the establishment of an ongoing ERISA plan; second, those statutes which are "generally applicable" and make no reference to, or that function irrespective of, the existence of an ERISA plan. Pet. Brief at p. 20. Petitioners' analysis and purported statements of the law are simply wrong.

First, Petitioners have turned the Court's decision in *Ingersoll-Rand* on its head. The Court found the Texas statute at issue expressly referred to, and was indeed "premised on," the existence of a pension plan. Therefore, under the *Mackey* preemption standard, the law was automatically subject to preemption. *Mackey* and *Ingersoll-Rand* stand for the proposition that state laws which make reference to ERISA plans are preempted without the need for any further analysis. *See Mackey*, 486 U.S. at 829-830; *Ingersoll-Rand*, 111 S. Ct. at 483.

While *Ingersoll-Rand* made it clear that state laws which make reference to ERISA plans are preempted, the Court did not

suggest, as Petitioners claim that ERISA *only* preempts state laws which make reference to ERISA plans. *Ingersoll-Rand* did not overrule *Shaw*, and the decision does not stand for the proposition that laws which make no reference to or function irrespective of ERISA plans are exempt from preemption. To the contrary, both *Mackey* and *Ingersoll-Rand* recognized that laws which relate to, but which may not make specific reference to, ERISA plans, are preempted under ERISA. Therefore, it is a sufficient, but not a necessary condition, for preemption that a state law make reference to an ERISA plan. As *Shaw* and its progeny have unequivocally established, a statute which makes no reference to an ERISA plan may nevertheless be preempted because it "relates to" such a plan.

Second, Petitioners' analysis of *Fort Halifax* and its implications is similarly misplaced. To suggest, as Petitioners do, that *Fort Halifax* stands for the broad proposition that state laws which do not require the establishment of an ongoing plan are not preempted by ERISA, or that ERISA preempts only laws which require creation of a plan, is a gross mischaracterization of the Court's decision. The Supreme Court did not hold, and has never held, that state laws which do not require the establishment of an ongoing ERISA plan are immune from preemption.

In *Fort Halifax*, 482 U.S. 1 (1987), the Supreme Court rejected an ERISA challenge to a Maine statute which required employers to provide a one-time severance payment to employees in the event of a plant closing. The basis for the Supreme Court's conclusion was that while the Maine statute "related to" employee *benefits*, it did not relate to the appellant's employee benefit *plan* because the appellant *had no ERISA plan*. *Id.* at 17-18. Hence, the question in *Fort Halifax* was whether the Maine statute required the appellant to *create* an ERISA plan. The Supreme Court found it did not because the obligation imposed by the

Maine statute was a *one-time* obligation which, therefore, required no continuing plan. *Id.* at 12-14. *Fort Halifax* turned on the absence of an ERISA plan rather than the failure of the statute to "relate to existing plans." Petitioners agree that *Respondents have ERISA plans*, and, unlike the statute at issue in *Fort Halifax*, it must be conceded that the rule is an ongoing requirement for apprentice training programs. Accordingly, *Fort Halifax* has no applicability to this case.[6]

Finally, Petitioners suggest that state laws which "function irrespective of" the existence of an ERISA plan and which apply to all employers are not preempted. This argument constitutes yet another misstatement of the law. The Supreme Court and the circuit courts have repeatedly held that laws which apply uniformly to employers and which are not intended to regulate ERISA plans are nevertheless preempted under the broad scope of ERISA preemption as defined by this Court in *Shaw*. Moreover, Respondents and other employers in Minnesota who train apprentice pipefitters have ERISA plans. Therefore, the ratio rule does not operate irrespective of ERISA plans. Indeed, as the Eighth Circuit concluded, the rule relates to and is intended to regulate the ERISA plans of employers who have training programs for pipefitter apprentices in Minnesota. Hence, Petitioners' argument is both flawed and wholly irrelevant for this case.

E. The Rule Is Not "Saved" by Either ERISA or the National Apprenticeship Act.

Petitioners now argue for the first time in this case that the ratio rule promulgated by the Department, is a "federal law" under the National Apprenticeship Act of 1937 (the "Fitzgerald Act")

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6. Moreover, the Supreme Court distinguished its decision in *Fort Halifax* from other cases where similar statutes were invalidated because they related to *existing ERISA plans*. *Fort Halifax*, 482 U.S. at 17-18.

26 U.S.C. § 50 (1988), and is therefore saved from preemption. Petitioners have never before raised this argument, and the Eighth Circuit did not rule on this question.[7] Therefore, the Court need not consider this issue.

As the Supreme Court stated in *Duigan v. United States*, 274 U.S. 195 (1927) "[t]his court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed below are reviewed." *Id.* at 200. *See also, GranFinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782 (1989); *City of Canton, Ohio v. Harris*, 489 U.S. 378, 386 n. 5 (1989) (the Court declined to determine issue because Petitioner failed to assert it as a "distinct ground" for recovery and court of appeals had not passed upon issue); *Delta Air Lines v. August*, 450 U.S. 347, 362 (1981) (the Court refused to consider a question not raised in the court of appeals because it was "not properly before" the Court).

Notwithstanding their failure to raise the issue previously, Petitioners now claim that the Department must be allowed to promulgate the rule because to hold otherwise "prevents the states from doing what the Fitzgerald Act regulations require . . . " Pet. Brief at p. 27. Petitioners' arguments are disingenuous because they effectively ask the Court to ignore both the purposes and the express language of the Fitzgerald Act and ERISA.

In the first instance, the Fitzgerald Act does not even apply in this case. The Fitzgerald Act is simply a policy statement for promotion of voluntary apprenticeship programs which seek to

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7. Petitioners' only previous mention of the Fitzgerald Act before the Eighth Circuit was as a footnote to their argument that the National Labor Relations Act does not preempt substantive state regulation. Significantly, because of its holding that the ratio is preempted under ERISA, the Eighth Circuit did not rule on this question.

be registered with the United States Department of Labor for federal contracts, grants and agreements. 29 C.F.R. § 29.2(K). As Petitioners admit, Minnesota's apprenticeship registration program, which exists under authority delegated by the Fitzgerald Act, is "voluntary." Petitioners concede that "employers remain free to establish any apprenticeship or training program they please . . . " Pet. Brief at 5. The Minnesota rule, however, applies to all training programs. Indeed, Respondents have not sought to register their ERISA apprentice training plans with the State of Minnesota. Thus, the Fitzgerald Act is irrelevant to Respondents' plans and, hence, this case.

The Fitzgerald Act itself does not transform this state rule into a federal law. As noted, the Fitzgerald Act is simply a policy statement and contains no substantive requirements. The Fitzgerald Act and its regulations are not mandatory but merely voluntary and apply only to those parties who seek certification of their apprenticeship programs for federal pursposes. More importantly, under the Fitzgerald Act there are no mandator numeric ratios of apprentice to journeyman in apprentice training programs and the state is not empowered by the Act to establish such mandated ratios. Petitioners themselves have admitted that "the Fitzgerald Act contemplates *voluntary* subscription to ratios." *See, supra,* n. 7 (emphasis added). The ratio rule is clearly not a requirement of the Fitzgerald Act. Thus, preemption of the ratio rule does not "prevent Minnesota from doing what the Fitzgerald Act encourages," namely, to review apprenticeship programs for the purpose of federal certification.[8] Preemption of the rule only

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8. In addition, the state may not promulgate rules which conflict with the federal program. In *Electrical Joint Apprenticeship Committee v. Frank McDonald*, Nos. 90-15095, 90-15395, 1991 WL 227779 (9th Cir. Nov. 8, 1991).

The apprenticeship program of Respondent BE&K Construction Company is based on an Associated Builders and Contractors apprentice program which (Cont'd)

prevents the state from doing that which is prohibited by ERISA.

Finally, the ERISA savings clause provides that "[n]othing in this chapter shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States, . . . any rule or regulation issued under such law." 29 U.S.C. § 1144(d). On its face, the saving language applies only to *federal*, not state, laws. The rule is, without question, a state law.

Moreover, Section 514(d) is not intended to provide a general exemption from preemption, but instead explicitly provides a well defined and limited set of areas which are exempt from ERISA preemption. The ERISA savings clause does not encompass state regulations of apprenticeship training programs. As this Court stated in *Shaw*, "[t]he combination of Congress' enactment of 514(a)'s all inclusive preemption provision and its enumeration of narrow, specific exemptions to that provision militate against expanding Section 514(d) into a more general savings clause." 463 U.S. at 104. Therefore, the ERISA savings clause, by its terms and in accordance with this Court's prior interpretations of that clause, does not apply to the rule at issue here.

(Cont'd)
has received Bureau of Apprenticeship Training approval and Respondent Boise Cascade Corporation is a signatory to a labor agreement that provides for an apprenticeship training program for apprentice employees. *See* Pet. App. at p. 44a. Thus, according to both the Fitzgerald Act, 29 C.F.R. § 29.10(a), and *McDonald*, 1991 WL 227779, at *4, the state's attempt to impose a ratio on these programs is preempted by ERISA.

CONCLUSION

For the reasons stated above, Respondents respectfully request that the Court deny the petition for a writ of certiorari.

Respectfully submitted,

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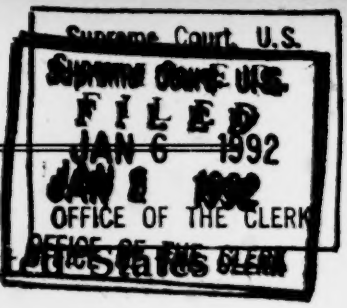

In The

Supreme Court of the United States

October Term, 1991

JOHN B. LENNES, JR., COMMISSIONER OF THE DEPARTMENT OF LABOR AND INDUSTRY, STATE OF MINNESOTA,

and

MINNESOTA MECHANICAL CONTRACTORS ASSOCIATION,

Petitioners,

v.

BOISE CASCADE CORPORATION, A DELAWARE CORPORATION, BE&K CONSTRUCTION COMPANY, A DELAWARE CORPORATION, CHARLES L. LEE, RELCO UNISYSTEMS CORPORATION, A MINNESOTA CORPORATION, FORREST DAHMES, MID-STATES MECHANICAL SERVICES, INC., A MINNESOTA CORPORATION, AND KRISTINE SOUTHARD,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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No. 91-707

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REPLY BRIEF OF PETITIONERS

INTRODUCTION

Petitioners submit this Reply Brief in support of their Petition for a Writ of Certiorari for two reasons:

(1) to clarify, contrary to Respondents' argument, that the job site ratio rule that the Eighth Circuit struck down in this case is qualitatively similar to other state or local occupational licensing laws and, therefore, the lower court's ERISA preemption holding has sweeping implications; and

(2) to alert the Court to three new court decisions, handed down since the petition in this case was filed, reflecting three conflicting approaches to the issue of ERISA preemption of state training and apprenticeship requirements and demonstrating the need for this Court to decide the issue.

ARGUMENT

I. THE RULING BELOW PLACES STATE OCCUPATIONAL LICENSING LAWS AND OTHER PUBLIC SAFETY REGULATIONS IN JEOPARDY AND IS SUFFICIENTLY SIGNIFICANT TO MERIT SUPREME COURT REVIEW.

A. Licensing Laws Are Jeopardized.

Respondents erroneously contend that the decision of the Eighth Circuit was narrow and carries no implications for the validity of other state occupational licensing laws or local public safety regulations. But that contention grossly understates the potential reach of the decision below. Because of its broad-ranging impact, this case merits plenary review by this Court.

The state regulation in question here is a simple one. Minnesota law generally requires everyone working on

high-pressure pipefitting projects to meet minimum educational and experience requirements and carry a license. Minn. Stat. § 306.48, subd. 1 (1990). In this way, Minnesota's licensing law is no different than numerous other state and local licensing laws throughout the country. Minnesota's pipefitting regulations, however, allow contractors to use unlicensed workers as well, provided that for the first unlicensed worker, there is at least one other pipefitter on the job site with a license and, for every unlicensed worker after that, there are at least three licensed pipefitters working at that job site project. Minn. Rules pt. 5230.0110 (1991).[1]

This is all that Minnesota requires. The State does not require that unlicensed workers be enrolled in an "approved" apprenticeship or training program (or indeed any training program at all). Nor does Minnesota in any way monitor the quality of the experience they gain or the "on-the-job training" they receive. This simple "ratio requirement" was held preempted below under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1144(a) (1988), on the grounds that it purportedly "related to" employer apprenticeship or training plans.

Respondents claim that the change in nomenclature of these unlicensed workers from "apprentices" to "trainees" in the new regulations reflects an illicit purpose to regulate training. But this slight semantic change does not justify a determination of ERISA preemption. Regardless of these labels, Minnesota's pipefitting "ratio

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[1] Minnesota also asks that these unlicensed workers register with the state department of labor and industry to assure that the State has some record of their experience. *Id.*

requirement" has no more effect on employer apprenticeship and training plans than other occupational licensing provisions. Most licensing laws do not permit employers to use unlicensed "apprentices" or "trainees" at all. If the Minnesota job site rule "relates to" ERISA plans, as Respondents maintain, every occupational licensing law in the country could be suspect. The holding of the court below may be viewed as giving employers the ability, under ERISA, to use as many unlicensed, unqualified employees as they wish on a work project, as well as unfettered capability to set the terms and conditions of employment for employees they designate as "trainees" or "apprentices" without regard to the broader public interest, as evinced by state or local regulatory or legislative measures. Under this reasoning, state and local regulatory bodies are prevented from using their traditional police powers to protect the public health and safety.

B. The Interests Are Significant.

Because of the broad potential impact on state regulatory mechanisms, this case is of substantial concern to the states, the federal government, and this Court.

The interest of the states is clear. On their behalf, the National Association of Attorneys General (NAAG) unanimously endorsed a resolution last June decrying ERISA preemption attacks on state laws governing occupational licensing and apprenticeship standards, among other measures. *See* attached Supplemental Appendix A.

The NAAG resolution, reflecting the views of the top law enforcement officials throughout the country, provides: "ERISA was intended to protect employees from abuse and mismanagement of employee benefit plans and to protect them from failure to pay promised benefits," but "due to a series of adverse federal court decisions construing ERISA's preemption provision more broadly than Congress originally intended, ERISA has become a tool for employers who wish to avoid their obligations under state law."

Likewise, the Federal government has an important concern in the resolution of this matter. The Bush administration has recently taken the position that ERISA preemption does not extend as far as the Eighth Circuit holds. The Secretary of Labor and the Secretary of Health and Human Services have jointly told the House Subcommittee on Labor-Management Relations in a September 24, 1991 letter, *see* attached Supplemental Appendix B, that there is no need for proposed legislation clarifying that ERISA does not preempt state training laws. The administration position as stated in that letter is that:

> Under H.R. 2782, state laws relating to apprenticeship or other training programs would not be preempted by ERISA. Such programs that are maintained by employers or employee organizations are expressly identified as employee benefit plans under ERISA. *ERISA's preemption provisions, however, do not prevent states from making training an occupational qualification or from establishing minimum standards for such training.*

(Emphasis added.)

Therefore, the circuit court decision at issue here is contrary to the position of the States, as well as the views of the executive branch of the federal government. These concerns fortify the justification for review and resolution of the ERISA preemption issue by this Court.

II. THE LOWER COURTS ARE IN CONFLICT OVER THE SCOPE OF ERISA PREEMPTION OF STATE LAWS AFFECTING APPRENTICESHIP AND TRAINING PLANS, AND THIS COURT SHOULD RESOLVE THOSE DIFFERENCES.

If this Court decides that the Minnesota regulation does, in fact, "relate to" ERISA apprenticeship and training programs, it also must decide whether the regulation is nevertheless saved from ERISA preemption because of the National Apprenticeship Act (Fitzgerald Act), 29 U.S.C. § 50 (1988), and its regulations. As the Petition explained, the Fitzgerald Act regulations actively encourage and specifically require the kind of "ratio requirement" Minnesota applies to pipefitting projects. Therefore, the court below erred in not considering the effect of the Fitzgerald Act before holding that ERISA preempted the Minnesota job site ratio rule.

Since the Petition for a Writ of Certiorari was filed in this case, at least three more courts have addressed the question whether the Fitzgerald Act saves state apprenticeship rules from ERISA preemption. Each court took a different view, illustrating both the practical and doctrinal confusion that exists.

First, in *Electrical Joint Apprenticeship Committee v. MacDonald*, No. 90-15095 (9th Cir. November 8, 1991), the

Ninth Circuit enjoined the Nevada Labor Commissioner from enforcing the apprenticeship component of Nevada's prevailing wage law on ERISA preemption grounds. Like several other states, Nevada requires public works contractors to establish or join particular apprenticeship programs, which go well beyond the requirements of regulations promulgated under the Fitzgerald Act.[2] The court held that ERISA preempted the Nevada law, but its ruling was quite narrow. The court emphasized that the Nevada rule was preempted because it was "independent and apart from the regulation authorized and provided for by the Fitzgerald Act and its accompanying regulations." *Id.* at 15249. Unlike Nevada's regulation, Minnesota's ratio requirement is expressly authorized by the Fitzgerald Act regulations. Under the Ninth Circuit's analysis, the Minnesota rule would not be preempted by ERISA.

In contrast, in *Southern California Chapter of Associated Builders and Contractors, Inc. (ABC) Joint Apprenticeship Committee v. California Apprenticeship Council*, No. A049486 (Cal. Ct. App., 1st Dist., December 3, 1991), a state appeals court held that ERISA preempted any state effort to withhold approval of apprenticeship programs, and, like the Eighth Circuit in this case, did so on the broadest possible grounds. Expressing "some reluctance to so hold," the court acknowledged that "the arguable

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[2] In contrast to the Nevada rule enjoined in *Electrical Joint Apprenticeship Committee*, Minnesota does not require public works contractors to create or join particular apprenticeship systems.

logical consequence" of its holding was that "all of California's laws regulating apprenticeship . . . would be preempted also," and that "such a result would allow only federal authorities to promulgate standards for apprenticeship programs, and strip [the states] of any function, except as [they] may advise upon and enforce applicable federal laws and regulations." *Id.*, slip op., at 11. The court added that Congress could amend ERISA "if this result is, as we suspect, unintended," but concluded that it had to follow what it perceived to be the weight of the authority. *Id.*, slip op., at 11.

Finally, in *Dillingham Construction v. County of Sonoma*, No. 90-1272 (N.D. Cal. December 11, 1991), a federal district court took yet a third view. The court in *Dillingham* upheld California's minimum employment standards for apprentices, on the grounds that they were consistent with the "purposes" of the Fitzgerald Act. The court reasoned:

> The State approval requirement insures the integrity of apprenticeship programs and protects the public and would-be apprentices from fraudulent programs which result in inadequately trained or abandoned apprentices. The court finds that this purpose falls squarely within the state's delegated jurisdiction under the Fitzgerald Act as articulated in the Fitzgerald Act itself and in its regulations.

Id., slip op., at 7. The court in *Dillingham* cited the Eighth Circuit decision in this case as contrary authority, *Id.* at 7, n. 8, but criticized the Eighth Circuit Court's ruling for not considering the effect of the Fitzgerald Act on the ERISA preemption question.

There are, therefore, at least three divergent viewpoints expressed by various courts on the proper scope of ERISA preemption over state regulations that "relate to" apprenticeship and training plans. The Eighth Circuit and the California Court of Appeals have held that ERISA preempts virtually all state apprenticeship and training regulations. The Ninth Circuit's position is that ERISA precludes only those state rules that are not expressly "authorized and provided for by the Fitzgerald Act and its accompanying regulations," which would, if applied here, validate the Minnesota ratio rule. But the Federal District Court in San Francisco takes the view consistent with the position here of Petitioners: that ERISA cannot preempt state regulations that are consistent with the purposes of the Fitzgerald Act, as is the 3:1 job site ratio at issue in this case.

This growing divergence of views, supports the need for acceptance of appellate review by this Court and resolution of the burgeoning conflict that has developed below.

CONCLUSION

For the reasons stated above, and in the original petition, the State of Minnesota and the Minnesota Mechanical Contractors' Association request that their petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Adopted

Summer Meeting
June 23-26, 1991
Seattle, Washington

RESOLUTION

ERISA PREEMPTION

WHEREAS, the Employee Retirement Income Security Act of 1974, (ERISA) was intended to protect employees from abuse and mismanagement of employee benefit plans and to protect them from failure to pay promised benefits; and

WHEREAS, due to a series of adverse federal court decisions construing ERISA's preemption provision more broadly than Congress originally intended, ERISA has become a tool for employers who wish to avoid their obligations under state law; and

WHEREAS, Congress has under consideration the ERISA Preemption Amendments of 1991, S. 794, which would curtail ERISA preemption attacks on state laws governing unfair insurance practices, prevailing wages, apprenticeship standards, and occupational licensing, and direct the Secretary of Labor to complete a study on the other effects of ERISA preemption.

NOW, THEREFORE, BE IT RESOLVED THAT THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL:

1) supports the passage and enactment of the ERISA Preemption Amendments of 1991; and

2) directs its Executive Director and General Counsel to establish a Working Group on ERISA Preemption to continue surveying and evaluating the problems in this area and report back to the Association at its Winter Meeting; and

3) directs its Executive Director and General Counsel to transmit this resolution of support to President Bush, Secretary of Labor Martin, the Congress, and other interested organizations.

Abstains: Generals Lungren and Norton

APPENDIX B

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

SEP 24 1991

The Honorable Pat Williams
Chairman
Subcommittee on Labor-Management Relations
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20518

Dear Chairman Williams:

It is our understanding that your subcommittee will soon begin markup of H.R. 1602 and H.R. 2782. These bills were intended to overrule a number of federal and state court holdings applying the federal preemption prevision contained in section 514 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). For the reasons set forth below, and in the enclosed report, the Department of Labor and the Department of Health and Human Services strenuously oppose enactment of the legislation. If these bills were presented to the President, we would recommend that he veto the legislation.

Congress enacted ERISA in 1974 to establish a comprehensive federal regulatory and enforcement scheme applicable to qualified employee benefit plans. Congress deliberately included a detailed federal preemption provision placing the principal regulatory authority in the hands of the federal government. That preemption provision states that ERISA, with certain exceptions, including

an exception for state laws which regulate insurance, security and banking, "shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan. . . . " (emphasis added).

For 17 years, ERISA preemption has provided a uniform national mechanism for achieving the statutory objective of equitably governing benefit plans and remedying benefit plan abuses. That uniformity has provided the predictability necessary to encourage employers to establish and continue to maintain employee benefit plans voluntarily. The need for federal uniformity assumes ever greater importance as the competitive pressure of the "national economy" of the 1970's relinquishes ground to that of the "global economy" of the 1990's.

The proposed legislation focuses on four recent federal and state court decisions. Those decisions found that certain provisions of state law regarding insurance company benefit claim practices, prevailing wage provisions relating to employee benefit requirements for public contracts, requirements for apprenticeship training plans maintained by employers bidding on public contracts, and remedies for collection of contributions to multiemployer pension and welfare plans, "relate to" employee benefit plans. Consistent with the ERISA statute, the courts found that those provisions of state law are preempted.

After careful consideration of the proposed Legislation, we believe that any speculative remedial benefits anticipated by the bill's sponsors would be far outweighed by the tremendous damage the legislation would do to the law governing employee benefit plans.

We are particularly concerned about the provisions of H.R. 1602 which would allow states to provide additional remedies for alleged unfair benefit claims practices by insurance companies. Remedies such as punitive and consequential damages will stimulate unnecessary litigation and will result in higher costs for insured health care plans. Most importantly, implementation of managed care and other arrangements designed to deal with our national problem of skyrocketing health care costs would be chilled by the prospect of lawsuits seeking consequential or punitive damages when a particular treatment is denied.

The problem of rising health care costs is an issue for all employers, particularly small businesses, and the nation as a whole. At a time when the Administration is struggling to find ways to address the problems of access to affordable health care, it seems counterproductive to add to the cost of insured plans, which are typically the only types of plans feasible for small businesses.

These bills purportedly address "problems" that have not been substantiated, and that certainly do not warrant such drastic legislative solutions. The bills give the states wide authority to regulate essential aspects of employee benefit plans. Such a change is in direct conflict with ERISA's intended purpose: uniform federal regulation of employee benefit plans voluntarily established by employers for their employees.

We thus oppose H.R. 1602 and H.R. 2782 because we believe, as drafted, the bills would undermine a fundamental and desirable feature of ERISA, namely, uniform federal regulation of employee benefit plans.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program and that enactment of this legislation would not be in accord with the President's program.

Sincerely,

/s/ Lynn Martin
LYNN MARTIN
Secretary of Labor

/s/ Louis W. Sullivan
LOUIS W. SULLIVAN, M.D.
Secretary of Health and Human Services

Enclosure

ADMINISTRATION POSITION ON H.R. 1602/H.R. 2782
ERISA PREEMPTION LEGISLATION

H.R. 1602 and H.R. 2782, as drafted, would impose inappropriate limits on ERISA's preemption provisions. Since the enactment of ERISA, these provisions have preserved a Uniform federal approach to the regulation of employee benefit plans. The broad exceptions created by the bills would endanger ERISA's statutory scheme by resurrecting the threat of conflicting or inconsistent state and local regulation of plans. Below is a summary of our position on each of the four areas where the bills would limit the reach of ERISA preemption.

A. State Insurance Claims Laws

H.R. 1602 would amend ERISA to allow states to provide remedies for alleged unfair benefit claims practices by insurance companies. This could include private lawsuits

seeking unlimited consequential and punitive damages. Under current law such state laws are preempted. ERISA provides uniform remedies for plan participants and plan fiduciaries against insurers who arbitrarily deny pension or welfare benefit claims. The proposals would give plan participants and fiduciaries different rights of action depending upon the state in which they were able to seek relief. These differences would almost certainly yield inconsistent or even conflicting benefit decisions within a given plan. H.R. 1602 also would modify current law, under which remedies available to participants of self-insured plans are identical to remedies available to participants of insured plans, by authorizing expanded state remedies against only "insurance companies and insurers." We are unaware of any factual support for the change H.R. 1602 proposes, and accordingly, support current law.

Availability of additional remedies, such as punitive or consequential damages, will have multiple adverse consequences. We believe that the pecuniary remedies available under current law are adequate to protect the interests of participants. New liabilities would result in higher costs for the maintenance of plans and would discourage plan formation. If enacted, this bill would interfere with benefits claims processing, encourage litigation, and add to the costs of providing benefits. Most importantly, implementation of managed care and other arrangements designed to deal with our national problem of skyrocketing health care costs would be chilled by the prospect of lawsuits seeking consequential or punitive damages when a particular treatment is denied. The problem of rising health care costs is an issue for all

employers, particularly small businesses, and the nation as a whole. At a time when we are all struggling for ways to address the problems of access to affordable health care, it seems counterproductive to add to the cost of insured plans, which are typically the only types of plans feasible for small businesses.

B. State Prevailing Wage Laws

H.R. 2782 proposes to exempt from preemption "any state law providing for the payment of prevailing wages." Many states require public works contractors to pay wages and fringe benefits at levels consistent with locally prevailing levels for such compensation. We believe that the language of the bill is too broad.

This exemption would give the States unfettered discretion to fashion unrelated prevailing wage laws so as to determine, in detail, not only the required types of fringe benefits, but also the terms and conditions under which they must be provided. Although the bills are intended merely to protect the so-called "little Davis-Bacon" laws, they may result in prohibitive administrative costs on contractors who seek to operate in multiple jurisdictions. They could provide a vehicle for states to mandate specific benefits through their "little Davis-Bacon" laws. This was not the intent of Davis-Bacon legislation, and the Administration opposes any attempt to excessively regulate employee benefits.

It is important to acknowledge that the court decisions which have motivated these bills have rendered relatively narrow holdings. They have invalidated only those portions of state "little Davis-Bacon" laws which required

certain types of fringe benefits be provided at certain levels. The general prevailing wage components of these laws have been unaffected by the rulings.

C. State Apprenticeship and Training Laws

Under H.R. 2782, state laws relating to apprenticeship or other training programs would not be preempted by ERISA. Such programs that are maintained by employers or employee organizations are expressly identified as employee benefit plans under ERISA. ERISA's preemption provisions, however, do not prevent states from making training an occupational qualification or from establishing minimum standards for such training.

The bills, however, go much further and would permit states to require that employers contribute to and participate in state-approved programs. Such mandated benefits impose costs on employers and limit their flexibility in selecting alternate means to assure a trained work force. Moreover, inconsistent state apprenticeship training requirements would penalize employers who operate in multiple jurisdictions.

Supreme Court, U.S.
FILED
JUN 2 1992
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(5)

No. 91-707

In the Supreme Court of the United States

OCTOBER TERM, 1991

JOHN B. LENNES, JR., COMMISSIONER, DEPARTMENT OF LABOR AND INDUSTRY, STATE OF MINNESOTA, ET AL., PETITIONERS

v.

BOISE CASCADE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974 (ERISA), which supersedes state laws insofar as they "relate to" employee benefit plans, 29 U.S.C. 1144(a), including certain "apprenticeship or other training programs," 29 U.S.C. 1002(1), preempts the application of a Minnesota occupational licensing law limiting the number of apprentice pipefitters at a jobsite.

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In the Supreme Court of the United States

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v.

BOISE CASCADE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent portion of ERISA's preemption provision, Section 514(a), 29 U.S.C. 1144(a); the definition of "employee welfare benefit plan" set out in Section 3(1) of ERISA, 29 U.S.C. 1002(1); the pertinent portion of Section 302(c) of the Labor-Management Relations Act, 29 U.S.C. 186(c), which is cross-referenced in Section 3(1) of ERISA; and the portions of the Secretary of Labor's regulatory definition of "employee welfare benefit plan" relating to apprenticeship programs and scholarship funds are reprinted in the appendix to this brief.

STATEMENT

1. For many years, Minnesota has regulated high pressure pipefitting. The reason is simple: improperly installed piping can explode and cause serious injury to both workers and the public. The State's regulatory scheme (1) requires pipefitters to satisfy occupational licensing requirements, and (2) establishes a code of technical safety standards enforced through issuance of state permits and inspections. Under these regulations, pipefitters must be licensed to install high-pressure piping, and unlicensed apprentices must work under the supervision of a licensed journeyman. An employer who hires unlicensed pipefitters is not required to establish an apprenticeship training program, but apprentices must register with the State and take the state licensing examination after four years of experience in the trade. Pet. App. 3a-5a.

Minnesota also has a separate regulatory scheme governing apprenticeship programs, which are approved by the State if they meet specified standards. That regulatory regime, which implements the National Apprenticeship Act of 1937 (the "Fitzgerald Act"), 29 U.S.C. 50, administered by the U.S. Department of Labor, is purely voluntary. Minnesota's voluntary apprenticeship standards for pipefitters have traditionally included a minimum jobsite ratio of journeymen to apprentices, in accordance with Department of Labor regulations. See 29 C.F.R. 29.5(b)(7). Any employer may establish an apprenticeship program; historically, however, only unions and unionized employers did so. Most pipefitter apprentices in Minnesota participated in those union-sponsored programs. Pet. App. 4a-5a, 18a.

In the mid-1980s, non-union employers began establishing apprenticeship training programs that did not comply with the State's voluntary standards, including the jobsite ratios. In response, the State in 1990 promulgated a mandatory rule—the "three-to-one rule"—requiring employers using unlicensed pipefitters to employ one licensed pipefitter for the first trainee and a ratio of three licensed pipefitters for each additional trainee. Pet. App. 4a-6a.

2. Respondents include four companies, Boise Cascade Corporation, BE&K Construction Company, Relco Unisystems Corporation, and Mid-States Mechanical Services, Inc., that employ and train pipefitters within Minnesota. Each employer has established (or proposed) an apprenticeship program that provides classroom instruction and on-the-job training for apprentice pipefitters. None of these programs has been approved by the State, and respondents typically employ a much higher ratio of apprentices to journeyman pipefitters than permitted by the State's three-to-one rule. Pet. App. 2a, 18a-19a & n.6.

To comply with Minnesota's new rule, respondents would have to incur significant expense for the obvious reason that journeyman pipefitters must be paid higher wages than apprentices. The four companies, joined by three apprentice pipefitters, accordingly brought suit in federal district court against the Commissioner of Minnesota's Department of Labor and Industry. The action sought an injunction against enforcement of the three-to-one rule on the ground that it is preempted by ERISA and the National Labor Relations Act (NLRA). The Minnesota Mechanical Contractors Association intervened as a defendant in support of the State. Pet. App. 28a, 38a n.3, 43a-45a.

3. Respondents filed a motion for a preliminary injunction, and the State filed a motion for summary judgment. The district court did not rule on the preliminary injunction motion; instead, the court granted summary judgment in favor of the State based upon its conclusion that the three-to-one rule is not preempted by federal law. For purposes of the State's summary judgment motion, the parties stipulated that respondents' pipefitter apprenticeship programs are "employee welfare benefit plan[s]" as defined in Section 3(1) of ERISA, 29 U.S.C. 1002(1). Pet. App. 44a.[1] In light of the parties' stipula-

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[1] ERISA defines an "employee welfare benefit plan" to include (A) "apprenticeship or other training programs" and (B) "any benefit described" in Section 302(c) of the Labor-Management Relations Act (LMRA), 29 U.S.C. 186(c). Section 302(c) of the LMRA in turn refers to 'trust fund[s] established * * * for the

tion, the district court did not consider whether respondents' programs were subject to coverage under ERISA.

Instead, the only ERISA question presented to the district court was whether Minnesota's three-to-one rule "relates to" an employee benefit plan within the meaning of ERISA's preemption provision, Section 514(a), 29 U.S.C. 1144(a). That section provides that ERISA "supersede[s] any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. The district court recognized that ERISA preemption is broad and not limited to laws specifically designed to affect employee benefit plans. It noted that the test established by this Court provides that a state law "relates to" an employee benefit plan under Section 514(a) of ERISA "in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983); see Pet. App. 23a. The district court added, however, that ERISA does not preempt all state laws that merely "affect" employee benefit plans, particularly in areas of traditional state regulation such as occupational training and public safety. Pet. App. 23a-24a.

Reviewing the case under the analytical framework of *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1 (1987), the district court concluded that the three-to-one rule was not preempted. The court reasoned that Minnesota's rule neither requires employers to establish employee benefit plans, nor is specifically designed to affect such plans, and it neither alters the terms of eligibility or the amount of benefits available to plan participants, nor imposes any funding, vesting, reporting, or enforcement requirements that would interfere with ERISA's substantive provisions. Pet. App. 27a. The court recognized that the jobsite ratio would have what it termed an "incidental effect" on existing apprenticeship plans because the rule would limit the number of participants and affect how

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purpose of * * * defraying costs of apprenticeship or other training programs."

on-the-job training could be done. *Id.* at 27a-28a. Nevertheless, the district court found that requirement to be comparable to other state occupational licensing requirements, such as years of experience and passing an examination, that ERISA would not preempt. *Id.* at 30a. Accordingly, the district court concluded that the rule was not preempted by Section 514(a) of ERISA because it is "a rule of general application concerning a subject traditionally reserved to the states which has no implications for ERISA's regulatory concerns and only an incidental effect on the administration of training programs." *Ibid.*[2]

3. The Eighth Circuit reversed. The court held that the jobsite ratio rule is preempted by ERISA because it "relates to" the apprenticeship training programs provided by the four respondent companies. Unlike the district court, the court of appeals concluded that the three-to-one rule was specifically designed to affect employee benefit plans because its purpose is to require employers to train apprentices in the manner the rule prescribes. Pet. App. 10a-11a. In the court of appeals' view, "the fact that the minimum jobsite ratio rule is part of an apprenticeship program and thus part of an employee benefit 'plan' under ERISA, [and] not merely an employee benefit, distinguishes the present case from *Fort Halifax*." *Id.* at 10a. The court also noted that the Minnesota rule could expose employers to conflicting or inconsistent state and local regulation, which ERISA preemption was designed to avoid. *Id.* at 11a.

The court therefore determined that the effect of the three-to-one rule on apprenticeship plans was more than "incidental," and could not be characterized as "tenuous, remote, or peripheral" under *Shaw*, 463 U.S. at 100 n.21, so as to permit the conclusion that the rule does not

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[2] The district court went on to conclude that the three-to-one rule is not preempted by the NLRA. Pet. App. 31a-34a. The court of appeals, which held that the three-to-one rule is preempted by ERISA, did not address the NLRA question. Nor do we.

"relate to" employee benefit plans. Pet. App. 12a. Instead, the court concluded that "[t]he minimum jobsite ratio rule directly affects an ERISA plan: it regulates, and was clearly intended to regulate, certain terms and conditions of the apprenticeship programs by establishing the manner in which employers can train and employ both journeymen and apprentice pipefitters." *Ibid.*

DISCUSSION

We do not believe that, in its present posture, this case is suitable for review. As we explain below, it is likely that further development of the record will establish that the apprenticeship programs operated by respondents are not covered by ERISA. If the programs are not subject to ERISA, then the Minnesota rule is not preempted insofar as it relates to those programs. This potentially dispositive threshold issue was not addressed by either the parties or the courts, because the issue of statutory coverage was conceded for purposes of the State's motion for summary judgment. In our view, this Court should decline to reach the question whether Minnesota's assertion of regulatory authority is improper, since resolution of this preemption issue may be unnecessary. Cf. *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249 (1948) (declining review on the merits where the record on summary judgment was incomplete).

In any event, we do not share the State's view that a pressing need exists for this Court to reconsider the general framework for analyzing ERISA preemption questions. This is the first decision to address preemption of jobsite supervisory ratios or other training requirements contained in state occupational licensing laws. Not only is the issue quite fresh in the lively world of ERISA-related litigation, but the lower courts' erroneous assumption that ERISA covered these programs may well have skewed their analysis of the preemption issue. The upshot is this: in its present posture, this case does not

present an appropriate occasion for a fundamental reconsideration of this Court's approach to ERISA preemption.

1. a. Section 3(1) of ERISA, 29 U.S.C. 1002(1), defines an "employee welfare benefit plan" as "any plan, fund or program * * * established or maintained by an employer or by an employee organization, or by both * * * for the purpose of providing for its participants or their beneficiaries" certain enumerated benefits. Included among the benefits listed in Section 3(1)(A) are "apprenticeship or other training programs" and "scholarship funds." Section 3(1)(B) further provides that a plan providing "any benefit described" in Section 302(c) of the Labor-Management Relations Act (LMRA), 1947, 29 U.S.C. 186(c), is covered by ERISA. Section 302(c)(6), in turn, defines benefits to include "a trust fund established * * * for the purpose of * * * defraying costs of apprenticeship or other training programs" and Section 302(c)(7) includes a "trust fund" established to provide "scholarships."

ERISA's preemption provision, Section 514(a), 29 U.S.C. 1144(a), provides that ERISA "shall supersede any and all State laws insofar as they * * * relate to any employee benefit plan" covered by ERISA. The statutory language establishes that the Minnesota rule is not preempted unless respondents' apprenticeship programs are "employee benefit plans" within the meaning of ERISA. Such a showing is a threshold prerequisite to preemption under Section 514(a).

b. In this case, it appears that neither the parties nor the courts below conducted any inquiry into coverage. They simply assumed, based on the statutory definition, that any "apprenticeship or other training program" is an employee benefit plan covered by ERISA. That assumption is wrong. The Secretary's coverage regulations and advisory opinions carve out a large exemption that may well include all of the pipefitter training programs operated by respondents.

First, the regulations exclude from coverage employee benefit plans that provide compensation for on-the-job

training. See 29 C.F.R. 2510.3-1(b)(3)(iv) (excluding "[p]ayment of compensation on account of periods of time during which an employee performs little or no productive work while engaged in training"). As the Secretary explained in proposing that exclusion, "[a]lthough section 3(1) of [ERISA] could be read to include job-skill training within the term 'welfare plan,' such training is virtually inseparable from an employee's normal duties for which compensation is paid, and therefore is not treated as an employee benefit plan." 40 Fed. Reg. 24,643 (1975). That regulatory exclusion is just one part of a broader coverage exclusion for a variety of "payroll practices" (such as overtime pay, sick pay, and vacation pay) which amount to nothing more than payment of ordinary compensation out of the employer's general assets. 29 C.F.R. 2510.3-1(b). Indeed, another part of the payroll practices regulation (the exclusion of vacation pay) has been upheld by this Court. *Massachusetts* v. *Morash*, 490 U.S. 107 (1989). Accordingly, in the Secretary of Labor's view, on-the-job training does not normally constitute an ERISA plan.

Second, the Secretary's regulations exclude various plans that provide for classroom instruction. Specifically, the regulations exclude so-called "[u]nfunded scholarship programs," including "tuition and education expense refund program[s], under which payments are made solely from the general assets of an employer or employee organization." 29 C.F.R. 2510.3-1(k); see 40 Fed. Reg. 34,527 (1975). The Department of Labor has also issued an advisory opinion stating that an in-house professional development program maintained by an accounting firm to provide continuing education for its licensed accountants, financed by the firm's general assets, is not an employee welfare benefit plan as defined in ERISA. ERISA Advisory Opinion No. 83-32A; see also ERISA Advisory Opinion No. 76-01 (tuition refunds to bank employees paid from the bank's general assets do not constitute a covered plan). Accordingly, in the Secretary's view, un-

funded classroom training programs, whether provided directly by an employer or purchased from an educational institution, do not constitute ERISA plans.

If neither on-the-job training nor classroom training paid for out of an employer's general assets is an ERISA plan, then an unfunded program providing both types of training is plainly not an ERISA plan either. On the other hand, apprenticeship programs and scholarship programs that are separately funded—such as joint apprenticeship trusts and scholarship trusts established under Section 302(c) of the LMRA—are covered by ERISA. The rationale for such a distinction is explained in *Massachusetts* v. *Morash*, 490 U.S. at 112-119. In *Morash*, the Court approved the Secretary's similar determination that only funded—and not unfunded—vacation pay arrangements were covered by ERISA. The Court stated that "[i]n enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds." *Id.* at 115. The existence of separate plan assets makes funded plans susceptible to the kinds of fiduciary abuses that ERISA was designed to prevent. The Court accordingly upheld the Secretary's payroll practice regulation insofar as it excluded unfunded vacation benefits from coverage.

In reaching that conclusion, the Court also noted that "the extension of ERISA to claims for vacation benefits would vastly expand the jurisdiction of the federal courts, providing a federal forum for any employee with a vacation grievance." 490 U.S. at 118-119. Similarly, if all employer-provided training is covered by ERISA, employees would have the right to bring benefit claims or fiduciary breach claims in federal court under Section 502(a) of ERISA, 29 U.S.C. 1132(a), each time their employer denied them an opportunity to attend a training course. ERISA was not intended to sweep so broadly; the Secretary quite properly exercised her rulemaking authority under Section 505 of ERISA, 29 U.S.C. 1135,

to define the proper scope of the term "employee welfare benefit plan."

As this Court has recognized, the Secretary's coverage regulations are entitled to deference. *Massachusetts* v. *Morash*, 490 U.S. at 115-118. Excluding unfunded apprenticeship and scholarship programs from ERISA coverage is a permissible interpretation of the statutory language and is fully consistent with Congress's intent. The LMRA was amended in 1959 to permit employers and unions to establish joint trust funds "for the purpose of * * * defraying costs of apprenticeship or other training programs." Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, § 505, 73 Stat. 537-539, adding Section 302(c)(6) of the LMRA, 29 U.S.C. 186(c)(6). The language incorporated in the ERISA definition, "apprenticeship or other training programs," mirrors that employed in the LMRA. This congruence of language suggests that Congress was referencing the form of separately funded apprenticeship and training trusts traditionally sponsored by unions. Similarly, Section 3(1) of ERISA refers to "scholarship funds," while Section 302(c)(7) allows a union to establish a "trust fund" to provide "scholarships." See Pub. L. No. 91-86, 83 Stat. 133 (1969). Accordingly, both the statutory language and its enactment history support the Secretary's regulations limiting ERISA coverage to apprenticeship programs and scholarship programs that are separately funded.[3]

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[3] In *Massachusetts* v. *Morash*, the Court rejected the argument that the reference to "vacation benefits" in Section 3(1)(A) of ERISA must include unfunded programs because the cross-reference to Section 302(c) of the LMRA in Section 3(1)(B) already covered funded vacation plans (since Section 302(c)(6) mentions "a trust fund established" to provide "pooled vacation" benefits). The Court instead recognized that Congress was "not concerned with duplication" in drafting Section 3(1). 490 U.S. at 114 n.9. Similarly, the fact that the cross-reference to Section 302(c) of the LMRA in Section 3(1)(B) brings funded apprenticeship and scholarship programs within ERISA's coverage does not preclude the Secretary's

c. In this case, the court of appeals' decision is silent as to the funding status of the apprenticeship and training programs operated by the four employer respondents. However, the record includes affidavits submitted by each respondent describing its program. Those affidavits reveal that three of the four employers do not sponsor a funded apprenticeship training program. Relco and Mid-States simply provide on-the-job training and pay for classroom instruction to prepare apprentice pipefitters for the state licensing examination. See Affidavits of Loren Corle, owner of Relco (Jan. 19, 1990), and Kent Durenberger, President of Mid-States (Jan. 19, 1990). Boise Cascade had proposed, but not implemented, an apprenticeship training program while this case was pending before the district court. See Affidavit of Bob Anderson, Public Affairs Manager (Jan. 22, 1990).[4] Based on affidavits presented to the district court, it seems clear that none of those three employers currently offers an apprenticeship training program that is an employee benefit plan under Section 3(1) of ERISA, as construed by the Secretary.

For a number of years, BE&K has offered an extensive apprenticeship program covering a variety of trades. BE&K typically includes in its contracts a ten-cent per payroll hour charge earmarked to pay for training and educating its employees, and maintains an in-house account that it calls the BE&K Training and Education Fund. See Affidavit of W. Douglas Cross, Vice-President of Operations (Jan. 22, 1990). It does not appear that this is a trust fund within the meaning of ERISA. In ERISA Advisory Opinion No. 83-32A, the Department of Labor determined that a similarly financed plan was excluded

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interpretation of "apprenticeship or other training programs" and "scholarship funds" in Section 3(1)(A). To the contrary, reading Section 3(1) as a whole supports the Secretary's decision that only funded apprenticeship and scholarship plans are subject to ERISA.

[4] We were informed that Boise Cascade has not implemented the proposed apprenticeship program described in its filing in the district court, but instead is currently considering offering apprenticeship training through a union fund.

from coverage. That opinion involved an accounting firm whose branch offices contributed a percentage of their net fees to their national office, which used the funds to provide continuing education programs. The Department concluded that earmarking revenues in this manner does not involve a "trust arrangement," subject to ERISA's coverage. There is, accordingly, substantial reason to doubt whether the BE&K program is covered; and further factual development in the district court would be necessary to resolve that issue.

In short, it is not apparent that any of the four employers sponsor apprenticeship programs that constitute "employee welfare benefit plans" within the meaning of Section 3(1) of ERISA. In light of the threshold coverage question, review of the preemption issue presented by petitioners is not warranted at this time.[5]

2. a. With respect to the question presented, petitioners recognize that this Court has repeatedly held that a

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[5] It appears that the coverage issue may be raised by petitioners on remand. Petitioners apparently conceded ERISA coverage only for the purpose of their own summary judgment motion, Pet. App. 44a, and all that has happened in this case thus far is that the district court granted summary judgment in favor of the State, despite that concession, and the court of appeals reversed. Respondents did not move for summary judgment. In any event, as a general rule, concessions that a party makes in support of its own motion for summary judgment do not carry over and support a cross-motion for summary judgment by the opposing party. 6 James W. Moore *et al., Moore's Federal Practice* ¶ 56.13, at 56-176 to 56-177 (2d ed. 1988); *Vetter* v. *Frosch*, 599 F.2d 630, 632 (5th Cir. 1979); *Begnaud* v. *White*, 170 F.2d 323, 327 (6th Cir. 1948). Accordingly, it appears that the district court, on remand, may take evidence and decide the coverage issue on the merits. Similarly, the court of appeals has discretion to reconsider the preemption question in light of the coverage issue. 1B James W. Moore *et al., Moore's Federal Practice* ¶ 0.404[1], at 117-124 (2d ed. 1983). This Court would be free to consider both the coverage and preemption issues (assuming both were preserved) if certiorari were granted following an appeal from a judgment on remand. *Id.* at ¶ 0.404[4.-6], at 140-141; *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 365-366 n.1 (1973).

state law "relates to" an employee benefit plan under Section 514(a), and is therefore preempted, "if it has a connection with or reference to such a plan." *Shaw*, 463 U.S. at 96-97; *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 483 (1990). Petitioners contend that the result in this case "demonstrates that this formulation of ERISA preemption doctrine simply does not provide the lower courts with sufficient guidance." Pet. 17. In their view, a new test should be formulated that limits the effect of Section 514(a). Regardless of whether a new "test" is needed, this case does not, in any event, present an appropriate occasion on which to reconsider this Court's interpretation of Section 514(a).

By preempting state laws "insofar as they * * * relate to" ERISA plans, Congress broadly shielded such plans from state regulation. Under Section 514(a), preemption is not limited to "state laws specifically designed to affect employee benefit plans" or to "state laws dealing with the subject matters covered by ERISA—reporting, disclosure, fiduciary responsibility, and the like." *Shaw*, 463 U.S. at 98; *FMC Corp.* v. *Holliday*, 111 S. Ct. 403, 408 (1990). The purpose of the state law is not dispositive; ERISA preempts state laws that intrude either directly or indirectly upon the area of exclusive federal concern. *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 524-525 (1981); *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985). Preemption is virtually required if the state law makes a specific "reference to" ERISA plans or is "specifically designed to affect" such plans. *Mackey* v. *Lanier Collections Agency & Serv., Inc.*, 486 U.S. 825, 829 (1988); *Ingersoll-Rand*, 111 S. Ct. at 483. Even if the state law does not expressly refer to substantive matters regulated by ERISA, preemption is nevertheless required if the State thereby subjects employers and plan administrators to conflicting state regulations burdening the administration of nationwide plans. *FMC*, 111 S. Ct. at 408; *Fort Halifax*, 482 U.S. at 10.

Contrary to petitioners' assertions, however, not all state laws imposing additional costs or administrative

burdens on employee benefit plans are preempted. *Mackey*, 486 U.S. at 831; *Ingersoll-Rand*, 111 S. Ct. at 483. "Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw*, 463 U.S. at 100 n.21.[6] In general, courts have declined to preempt "laws of general application—often traditional exercises of state power or regulatory authority—whose effect on ERISA plans is incidental." *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142, 146 (2d Cir.), cert. denied, 493 U.S. 811 (1989). This exception to the general rule of preemption "follows as a matter of common sense from the fact that ERISA plan members and managers are bound to engage in myriad transactions that Congress never considered when it drafted § 514. A preemption provision designed to prevent state interference with federal control of ERISA plans does not require the creation of a fully insulated legal world that excludes these plans from regulation of any purely local transaction." *Rebaldo* v. *Cuomo*, 749 F.2d 133, 138 (2d Cir. 1984), cert. denied, 472 U.S. 1008 (1985).[7] Ultimately, however, the fact that

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[6] Applying this exception, courts have found no ERISA preemption of state laws involving matters as varied as garnishment of welfare plan benefits to collect debts of plan participants (*Mackey*); escheat of uncollected ERISA benefit checks to a State (*Aetna Life Ins. Co.* v. *Borges*, 869 F.2d 142 (2d Cir.), cert. denied, 493 U.S. 811 (1989)); a city income tax of general application affecting employee contributions to benefit plans (*Firestone Tire & Rubber Co.* v. *Neusser*, 810 F.2d 550 (6th Cir. 1987)); a state law imposing fiduciary duties on corporate officers for the benefit of shareholders, including ERISA plans (*Sommers Drug Stores Co. Employee Profit Sharing Trust* v. *Corrigan Enterprises, Inc.*, 793 F.2d 1456 (5th Cir. 1986), cert. denied, 479 U.S. 1034, 1089 (1987)); a law prescribing hospital rates for inpatient care, including the rates charged to plans (*Rebaldo* v. *Cuomo*, 749 F.2d 133 (2d Cir. 1984), cert. denied, 472 U.S. 1008 (1985)); and application of a state fair employment practices law to a plan in its capacity as an employer (*Lane* v. *Goren*, 743 F.2d 1337 (9th Cir. 1984)).

[7] Accordingly, this Court has assumed that ERISA plans are subject to many "run-of-the-mill state-law claims such as unpaid

a state law is one of general application representing a traditional exercise of state authority will not insulate it from preemption if the law significantly affects employee benefit plans. See, *e.g.*, *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41 (1987) (preempting a state common law action for improper processing of a claim for benefits from an ERISA plan).

Whether a state law "relate[s] to" an employee benefit plan in a manner that requires preemption is admittedly not always easy to determine. But Section 514(a) does not create the "regulatory 'black hole' of mammoth proportions" that petitioners allege. Pet. 15. That allegation, and the hypothetical examples supporting it, are based in part on petitioners' misunderstanding of the scope of the definition of "employee welfare benefit plan." For example, petitioners' charge that most state rules governing nursing trainees would be preempted under the logic of the court of appeals' decision, Pet. 14, is incorrect if only funded apprenticeship programs are subject to ERISA.

Moreover, the court of appeals' overbroad assumptions about ERISA coverage also appear to have skewed its preemption analysis. For instance, when the court of appeals concluded that "[t]he minimum jobsite rule was specifically designed to affect employee benefit plans," Pet. App. 11a, so as to be automatically preempted under *Mackey*, it erroneously assumed that any law relating to apprenticeship or training necessarily relates to covered plans only. That is not the case. Although the Minnesota rule was plainly designed to affect on-the-job supervision and training of unlicensed pipefitters, such training will often occur outside the context of an ERISA plan.

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rent, failure to pay creditors, or even torts committed by an ERISA plan." *Mackey*, 486 U.S. at 833. The lower courts similarly have assumed that ERISA would not preempt "state laws and municipal ordinances regulating zoning, health, and safety" (*Lane* v. *Goren*, 743 F.2d at 1340); "labor laws that govern working conditions and labor costs" (*Rebaldo* v. *Cuomo*, 749 F.2d at 138); and "rent control laws that determine what employee benefit plans pay or receive for rental property" (*ibid.*).

These coverage-related factors—that the three-to-one rule affects many programs not subject to ERISA and that Congress included apprenticeship and scholarship programs in the definition of "employee welfare benefit plan" because it was concerned with regulating trust funds established to provide training—should have been considered in the preemption analysis under the standards formulated by this Court.

On the record as it now exists, however, it is difficult to determine under those standards whether the three-to-one rule is preempted insofar as it affects employee benefit plans covered by ERISA. For that reason as well as the fact that the coverage issue was not addressed by the lower courts, this case is not a suitable vehicle for reconsidering the standards established by this Court to determine whether a state law "relate[s] to" an ERISA plan.

b. Nor do we discern any pressing need to review this case. In particular, there is no conflict in the circuits regarding ERISA preemption of state apprenticeship regulations. This is the first case specifically to address state jobsite supervisory ratios or other training standards contained in state occupational licensing laws. In related cases, the Ninth and Tenth Circuits have struck down certain rules involving apprenticeship programs imposed on public works contractors by state prevailing wage and benefit laws. Thus, in *Electrical Joint Apprenticeship Comm.* v. *MacDonald*, 949 F.2d 270 (9th Cir. 1991), petition for cert. pending, No. 91-1416 (filed Feb. 3, 1992), and *National Elevator Indus., Inc.* v. *Calhoon*, 957 F.2d 1555 (10th Cir. 1992), the preempted state laws required employers to participate in state-approved apprenticeship programs in order to avoid having to pay full journeyman wages to all employees working on state public works projects. Similarly, in *Local 598* v. *J.A. Jones Constr. Co.*, 846 F.2d 1213 (9th Cir.), aff'd mem., 488 U.S. 881 (1988), the preempted state law compelled employers with state public works contracts to contribute to apprenticeship training funds at a state-mandated level. In *Hydrostorage, Inc.* v. *Northern Cal.*

Boilermakers Local Joint Apprenticeship Comm., 891 F.2d 719 (9th Cir. 1989), cert. denied, 111 S. Ct. 72 (1990), the preempted state law required employers with public works contracts to: (1) establish or join apprenticeship programs complying with state-approved apprenticeship standards; (2) employ apprentices in a state-mandated minimum ratio; and (3) contribute to apprenticeship and other trust funds (or pay an equal amount to the State).[8]

While consistent with the decision below in that the Ninth and Tenth Circuits held in each case that state laws relating to apprenticeship programs were preempted, those decisions do not show that ERISA preemption is so broad that this Court must reconsider its construction of Section 514(a). In the cases decided by the Ninth and Tenth Circuits, the preempted state law required the employer to establish, join, or contribute to a funded apprenticeship plan as a condition for receiving state public works contracts. Thus, the laws in question appeared to have a close relationship to plans covered by ERISA.

Nor do the decisions in the other cases compel the conclusion that the three-to-one rule is preempted insofar as it affects funded plans in Minnesota, since the relationship of the three-to-one rule to apprenticeship training programs is somewhat more attenuated. First, the Minnesota rule does not require employers to hire any apprentices at all; an employer would be in full compliance if it used only licensed journeyman pipefitters. Second, the rule does not require employers to establish or maintain any kind of structured or formalized apprenticeship training program; it requires only that unlicensed pipefitters be supervised on the job by a certain ratio of licensed pipefitters to ensure that their work is performed properly.

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[8] Each of the decisions of the Ninth and Tenth Circuits involved funded apprenticeship programs. In *National Elevator Industry, Hydrostorage*, and *Local 598*, the state law affected traditional apprenticeship programs operated by unions. See 957 F.2d at 1558; 891 F.2d at 728; and 846 F.2d at 1217. In *Electrical Joint Apprenticeship Comm.*, the apprenticeship funds were administered by an employer trade association. See 949 F.2d at 272.

Third, the rule does not require any employer to establish or contribute to a separate apprenticeship or training fund, which, as we have stated, is a requisite for coverage under ERISA.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] Contrary to petitioners' argument, Pet. 26-30, the Fitzgerald Act, 29 U.S.C. 50, and ERISA's savings clause for other federal laws, 29 U.S.C. 1144(d), have no bearing on this case. In promulgating its jobsite ratio for pipefitters, Minnesota did not purport to act under the authority of the Fitzgerald Act, but rather acted under the authority of its state occupational licensing law for pipefitters. Moreover, the State's mandatory jobsite ratio goes beyond anything required by the voluntary federal regulations, which merely provide for registered apprenticeship programs to set out a specific "numeric ratio of apprentices to journeymen, consistent with proper supervision, training, safety, and continuity of employment, and applicable provisions in collective bargaining agreements." 29 C.F.R. 29.5(b)(7). Thus, preemption of the State's three-to-one rule would in no manner impair the operation of the voluntary federal program. See generally *Shaw*, 463 U.S. at 100-104. Indeed, the employers here did not even have state-registered voluntary apprenticeship programs.

APPENDIX

Section 514(a) of ERISA, 29 U.S.C. 1144(a), provides in pertinent part:

> Except as provided in subsection (b) of this section, the provisions of this [title] and [title IV] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

Section 3(1) of ERISA, 29 U.S.C. 1002(1), provides:

> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

Section 302(c) of the Labor-Management Relations Act, 29 U.S.C. 186(c), provides, in pertinent part:

* * * * *

> (6) * * * a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs * * *; (7) * * * a pooled or individual trust fund estab-

lished by such representative for the purpose of (A) scholarships * * *.

29 C.F.R. 2510.3-1, "employee welfare benefit plan," provides in pertinent part:

* * * * *

(b) *Payroll practices.* For purposes of title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include—

* * * * *

(3) Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment) performs no duties; for example—

* * * * *

(iv) Payment of compensation on account of periods of time during which an employee performs little or no productive work while engaged in training * * *.

* * * * *

(k) *Unfunded scholarship programs.* For purposes of title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include a scholarship program, including a tuition and education expense refund program, under which payments are made solely from the general assets of an employer or employee organization.

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